

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

IN RE: )  
 )  
TART CHERRIES GROWN IN ) Docket Number(s)  
MICHIGAN, NEW YORK, ) 11-0093  
PENNSYLVANIA, OREGON, ) AO-370-A9  
UTAH, WASHINGTON, and ) FV-10-930-5  
WISCONSIN ) AMS-FV-10-0087

Wednesday, April 20, 2011

U.S. Bankruptcy Court  
One Division Avenue  
Courtroom A  
Grand Rapids, Michigan

The above-captioned hearing was  
held pursuant to notice at 8:30 a.m.

BEFORE:

JILL S. CLIFTON, Administrative Law Judge  
One Division Avenue  
Grand Rapids, Michigan  
(707) 364-8996

PRESENT:

ON BEHALF OF THE USDA MARKETING

DIVISION:

MS. SHARLENE DESKINS

MR. MARTIN ENGELER

MS. PARISA SALEHI

MR. KENNETH G. JOHNSON

MS. JENNIE M. VARELA

MR. MARC MC FETRIDGE

ON BEHALF OF THE CHERRY INDUSTRY

ADMINISTRATIVE BOARD:

MR. BRIAN T. HILL

MR. PERRY M. HEDIN

## CONTENTS

WITNESS	PAGE
Marc McFetridge . . . . .	11
Thomas Facer. . . . .	25
James Nugent. . . . .	96
Perry Hedin . . . . .	.111
Richard DeRuiter. . . . .	.148
Roy Hackert . . . . .	.165
Daryl Peterson. . . . .	.195
Randy Willmeng. . . . .	.208
EXHIBIT NO.	PAGE
1 Hearing Notice. . . . .	12
2 Press Release . . . . .	13
3 Certificate of Mailing. . . . .	13
4 Press Release Certificate . . . . .	14
5 Hearing Notice Certificate. . . . .	14
6 McFetridge Testimony. . . . .	15
7 Statistical Information on the U.S. Red Tart Cherry Industry . . . . .	21
8 Facer Testimony . . . . .	25
9 USDA Data . . . . .	.149
10 USDA Data . . . . .	.150
11 DeRuiter Testimony. . . . .	.164
12 Hackert Testimony . . . . .	.164
13 Document September 22nd, 2010 . . . . .	.224
14 Letter from November 24th, 2010 . . . . .	.224
15 Hedin Testimoy. . . . .	.224

P-R-O-C-E-E-D-I-N-G-S

(8:30 a.m.)

1  
2  
3 JUDGE CLIFTON: We're now on  
4 record. It's April 20, 2011. It's a  
5 Wednesday. It's 9:04 in the morning. We're  
6 in Grand Rapids, Michigan. This is a rule  
7 making hearing. The case is scheduled,  
8 pursuant to an announcement in the Federal  
9 Register, that will be referred to later. The  
10 locations of the hearing are here, and then  
11 next week in Provo, Utah.

12 My name is Jill Clifton. I'm the  
13 United States Administrative Law Judge who's  
14 been assigned to take in the testimony and the  
15 exhibits, and to certify the record. I am not  
16 the decision maker. I do resolve issues of,  
17 that may arise, involving conflicts about  
18 what's relevant and what's admissible, and  
19 that type of thing. Purely in an evidentiary  
20 fashion during the hearing.

21 I'd like now to read into the  
22 record the heading, the case caption and the

1 docket numbers. The heading is United States  
2 Department of Agriculture, Before the  
3 Secretary of Agriculture. The caption is, In  
4 Re: Tart Cherries Grown in Michigan, New  
5 York, Pennsylvania, Oregon, Utah, Washington  
6 and Wisconsin. The Docket Numbers are Docket  
7 Numbers 11-0093, AO-370-A9, FV-10-930-5, and  
8 AMS-FV-10-0087.

9 I'd like to take appearances of  
10 those who will be participating, starting  
11 first with those who are seated at counsel  
12 table, beginning please with Ms. Deskins.

13 MS. DESKINS: Good morning. My  
14 name is Sharlene Deskins. I'm an attorney  
15 with the United States Department of  
16 Agriculture, also the General Counsel. I  
17 represent the Agriculture Marketing Service in  
18 this proceeding.

19 JUDGE CLIFTON: And Ms. Deskins,  
20 please spell both of your names.

21 MS. DESKINS: My first name is  
22 spelled S-h-a-r-l-e-n-e, my last name is

1 spelled D-e-s-k-i-n-s.

2 JUDGE CLIFTON: Thank you.

3 MR. ENGELER: My name is Martin  
4 Engeler, that's spelled M-a-r-t-i-n, E-n-g-e-  
5 l-e-r, and I work with the USDA Agricultural  
6 Marketing Service, the Marketing Order  
7 Administration Branch, and I am stationed  
8 currently in Fresno, California.

9 MS. SALEHI: Good morning. My  
10 name is Parisa Salehi, that is spelled P-a-r-  
11 i-s-a, last name, S-a-l-e-h-i. I work for the  
12 Marketing Order Administration Branch.

13 JUDGE CLIFTON: All right, thank  
14 you. Now, those people who are not seated at  
15 counsel table, you may either approach the  
16 podium, or approach counsel table and identify  
17 yourself, please.

18 MR. JOHNSON: Good morning. My  
19 name is Kenneth Johnson, K-e-n-n-e-t-h, J-o-h-  
20 n-s-o-n. I am with AG Marketing Service Food  
21 Investment Programs, Marketing Order  
22 Administration Branch, and a Regional Manager

1 of the D.C. Marketing Field Office.

2 MS. VARELA: Good morning. My  
3 name is Jennie Varela, J-e-n-n-i-e, V-a-r-e-l-  
4 a. I'm with the Agricultural Marketing  
5 Service, Fruit and Vegetable Program, in the  
6 Southeast Marketing Sales Office.

7 JUDGE CLIFTON: Now, just so I'm  
8 clear, Ms. Varela, where physically are you  
9 normally officed?

10 MS. VARELA: Winter Haven,  
11 Florida.

12 JUDGE CLIFTON: Winter Haven,  
13 Florida. And Mr. Johnson, where physically  
14 are you usually?

15 MR. JOHNSON: I'm in Riverdale,  
16 Maryland.

17 JUDGE CLIFTON: Okay.

18 MR. MC FETRIDGE: My name is Marc  
19 McFetridge, that's M-a-r-c, M-c-F-e-t-r-i-d-g-  
20 e. I'm with the AG Marketing Service, Fruit  
21 and Vegetable Program, Economic Analysis in  
22 the Program Timing Branch.

1 JUDGE CLIFTON: All right, good.

2 Now, let's go to counsel table for, where  
3 Brian Hill is seated, and I will let him tell  
4 me his official capacity in this hearing.

5 MR. HILL: Yes, my name is Brian  
6 Hill, B-r-i-a-n, last name H-i-l-l, with the  
7 United States Department of Agriculture's  
8 Office of General Counsel, Marketing Division  
9 in Washington, D.C., and I will be  
10 representing the Cherry Industry  
11 Administrative Board in this matter.

12 JUDGE CLIFTON: Does that Board  
13 have a nickname?

14 MR. HEDIN: CIAB.

15 JUDGE CLIFTON: All right, good.

16 MR. HEDIN: Good morning, I'm  
17 Perry Hedin, that's P-e-r-r-y, H-e-d-i-n. I'm  
18 the Executive Director of the CIAB, or the  
19 Cherry Industry Administrative Board, and we  
20 are housed permanently in DeWitt, Michigan.  
21 That's D-e-W-i-t-t.

22 JUDGE CLIFTON: Spell your last

1 name for me again, please?

2 MR. HEDIN: H-e-d as in David, i-n  
3 as in Nancy.

4 JUDGE CLIFTON: All right. Now,  
5 you have mentioned that there is a sign-in  
6 sheet for witnesses, that is placed toward the  
7 back of the room, and the people do not have  
8 to sign. But, if they do sign, they may also  
9 want to print. We need the names to be  
10 perfectly legible.

11 I won't have the witnesses  
12 identify themselves now, because we'll do that  
13 as they come to the stand. Do you anticipate,  
14 Ms. Deskins, that we may finish today?

15 MS. DESKINS: Oh, I think it's  
16 going to take two days.

17 JUDGE CLIFTON: All right. Mr.  
18 Hill, what's your best guess?

19 MR. HILL: It will certainly  
20 finish tomorrow, because there are some  
21 witnesses that are scheduled to come in  
22 tomorrow.

1                   JUDGE CLIFTON: All right. That's  
2 clear, good. All right. I think of nothing  
3 else that I need to do before asking Ms.  
4 Deskins to begin with the substantive part of  
5 the hearing. Ms. Deskins, you may proceed.

6                   MS. DESKINS: Thank you, Judge  
7 Clifton.

8                   The hearing today is an Amendment  
9 Hearing regarding the Tart Cherries Marketing  
10 Order, which is Order Number 930. The Notice  
11 of Hearing was published on March 14th, 2011.  
12 In that notice it does state that all of the  
13 USDA employees involved in the decision-making  
14 process, involved in this hearing, are  
15 prohibited from discussing the merits of the  
16 case with any interested party. What that  
17 means is that we cannot talk to you about what  
18 the substance is of this hearing. However, if  
19 you have a procedural question for us, such as  
20 how we get an exhibit in, when can you  
21 testify, we can talk to you about any of those  
22 kinds of issues.

1                   Judge Clifton, my first witness  
2 today is going to be Mr. Marc McFetridge.

3                   ADMIN. JUDGE CLIFTON: You may  
4 approach, and be seated in the witness stand.  
5 Unless you prefer to be some other place.  
6 Over here. And I'll swear you in after you  
7 are seated.

8                   First, please state again your  
9 full name?

10                  MR. MC FETRIDGE: My name is Marc  
11 McFetridge.

12                  JUDGE CLIFTON: Thank you.  
13 Whereupon,

14                               MARC McFETRIDGE,  
15 called as a witness herein, having been first  
16 duly sworn, was examined and testified as  
17 follows:

18                  JUDGE CLIFTON: Thank you. Ms.  
19 Deskins, you may proceed.

20                  MS. DESKINS: Judge Clifton,  
21 before we get some things rolling, I forgot  
22 about, do we need to put into the record the

1 exhibits?

2 JUDGE CLIFTON: That's fine. Now  
3 is good.

4 MS. DESKINS: Regarding the  
5 hearing, the first exhibit that needs to, that  
6 I'd like to propose entry is the notice that  
7 was published in the Federal Register  
8 regarding this case, and it's already been  
9 marked as Exhibit No. 1.

10 JUDGE CLIFTON: Is there any  
11 objection?

12 MR. HILL: No objection, your  
13 Honor.

14 JUDGE CLIFTON: Exhibit 1 is  
15 admitted.

16 (Whereupon Exhibit No. 1 was  
17 admitted into evidence.)

18 MS. DESKINS: The next exhibit is  
19 the actual press release regarding this  
20 hearing. It's already been marked as Exhibit  
21 No. 2.

22 JUDGE CLIFTON: Any objection?

1 MR. HILL: No objection.

2 JUDGE CLIFTON: Exhibit 2 is  
3 admitted.

4 (Whereupon Exhibit No. 2 was  
5 admitted into evidence.)

6 MS. DESKINS: Exhibit No. 3, Judge  
7 Clifton, what do you have as Exhibit No. 3?  
8 I'm missing --

9 JUDGE CLIFTON: It's the document  
10 that over the signature of Parisa Salehi.

11 MS. DESKINS: Okay, the  
12 Certificate of Mailing.

13 JUDGE CLIFTON: Yes.

14 MS. DESKINS: Okay. I'd like to  
15 have that marked as Exhibit No. 3. Exhibit  
16 No., oh --

17 JUDGE CLIFTON: Is there any  
18 objection to it being admitted?

19 MR. HILL: No, your Honor.

20 JUDGE CLIFTON: Exhibit 3 is  
21 admitted into evidence.

22 (Whereupon Exhibit No. 3 was

1 admitted into evidence.)

2 MS. DESKINS: Exhibit No. 4 is the  
3 Certificate regarding the Press Release.

4 JUDGE CLIFTON: Is there any  
5 objection?

6 MR. HILL: No.

7 JUDGE CLIFTON: Exhibit 4 is  
8 admitted into evidence.

9 (Whereupon Exhibit No. 4 was  
10 admitted into evidence.)

11 MS. DESKINS: Exhibit No. 5 is the  
12 Certificate that the Governors of the States  
13 of Michigan, New York, Pennsylvania, Oregon,  
14 Utah, Washington and Wisconsin, have been  
15 notified about this hearing.

16 JUDGE CLIFTON: Is there any  
17 objection?

18 MR. HILL: No objection.

19 JUDGE CLIFTON: Exhibit 5 is  
20 admitted into evidence.

21 (Whereupon Exhibit No. 5 was  
22 admitted into evidence.)

1 MS. DESKINS: Judge Clifton, I'd  
2 like to have marked as Exhibit No. 6, the  
3 testimony of Marc McFetridge.

4 JUDGE CLIFTON: And it is so  
5 marked.

6 (Whereupon Exhibit No. 6 was  
7 marked for identification.)

8 JUDGE CLIFTON: Do you want to  
9 wait until Mr. McFetridge has testified to  
10 move its admission?

11 MS. DESKINS: Yes, I do.

12 JUDGE CLIFTON: All right.

13 MS. DESKINS: And he has another  
14 exhibit, Exhibit No. 7, which is some  
15 statistical information on the U.S. Red Tart  
16 Cherry Industry. And I've had that marked as  
17 7.

18 JUDGE CLIFTON: All right. Now,  
19 are there copies for those that need to look  
20 at them during the testimony?

21 MS. DESKINS: There should be some  
22 in the, yes, Mr. Johnson has some. Do you

1 want me to pass them out right now?

2 JUDGE CLIFTON: Yes, this would be  
3 good so that everyone can look along as Mr.  
4 McFetridge proceeds.

5 All right. You may proceed, Ms.  
6 Deskins.

7 EXAMINATION

8 BY MS. DESKINS

9 Q Mr. McFetridge, it's my  
10 understanding that you have prepared some  
11 testimony for this hearing?

12 A That is correct.

13 Q Would you like to read through  
14 your testimony now?

15 A Yes. My name is Marc McFetridge.  
16 I've worked for the U.S. Department of  
17 Agriculture since 2006. I worked for the  
18 Marketing Order Administration Branch from  
19 July, 2006 through December, 2009. From  
20 December, 2009 to the present, I've worked for  
21 the Economic Analysis and Program Timing  
22 Branch as an Agriculture Economist, where my

1 duties include preparing economic and  
2 statistical analysis, which are used by  
3 government officials, to help administer  
4 federal programs and fruits and vegetables  
5 programs. A large part of my work is related  
6 to Federal Marketing Order issues.

7 I received a Bachelor's Degree in  
8 Agriculture Business Management in 2001 from  
9 Oregon State University, and a Master's Degree  
10 in Agriculture and Resource Economics in 2004  
11 from Oregon State University.

12 Concerning the various proposed  
13 amendments, the Department has taken a neutral  
14 position. For this hearing on Tart Cherries,  
15 I prepared a report titled U.S. Tart Cherry  
16 Crop Statistics, Graphs and Tables. The  
17 biggest source is the National Agriculture  
18 Statistic Service, USDA.

19 The purpose of this report is to  
20 introduce U.S. Government data and other  
21 relevant information into the hearing record.  
22 These data and graphs are intended to be used

1 by all parties involved in the hearing, in  
2 discussion and analyzing the merits of the  
3 various proposed amendments.

4 In the report, graphs and tables  
5 are shown for the U.S., and the seven major  
6 producing states. The graph on Page 3, shows  
7 the total U.S. berrying acres reached a high  
8 point of 55 and 50 acres, or 50,050 acres in  
9 1987, but berrying acres has declined almost  
10 29 percent since.

11 JUDGE CLIFTON: All right, so I  
12 just want to make sure that this gets typed  
13 right, Mr. McFetridge. So, the high point was  
14 how many acres?

15 THE WITNESS: 50,000 acres 50.

16 JUDGE CLIFTON: Okay. 50,050  
17 acres.

18 THE WITNESS: Yes.

19 JUDGE CLIFTON: So, the numbers  
20 are 50,050?

21 THE WITNESS: Exactly.

22 JUDGE CLIFTON: Okay, good. Go

1 on.

2 THE WITNESS: The graph on Page 5  
3 shows that the U.S. Tart Cherry yield has  
4 fluctuated between a low of 1,660 pounds per  
5 acre, to a high of 10,100 pounds per acre.

6 The graph on Page 7 shows that the  
7 U.S. Tart Cherry production has fluctuated  
8 between the low of 62.5 million pounds, to a  
9 high of 395.6 million pounds.

10 The graph on Page 9 shows the  
11 prices of seed by tart cherry growers has  
12 fluctuated between a low of 6 cents per pound,  
13 to a high of 47 cents per pounds.

14 The graph on Page 11 shows that  
15 the U.S. Tart Cherry Value Production has  
16 fluctuated between a low of 18,456,000, to a  
17 high of 88,082,000.

18 A graph depicted in the inverse  
19 relationship between the fluctuation of  
20 production and changes in price, is shown on  
21 Page 13,

22 JUDGE CLIFTON: All right. And

1 again, just so that that 88,000,000 figure  
2 gets typed right, repeat for us how the  
3 numbers go.

4 THE WITNESS: Sure, it is  
5 88,082,000.

6 JUDGE CLIFTON: Thank you.

7 MS. DESKINS: Judge Clifton, at  
8 this time, I move for the admission of Exhibit  
9 6 and 7.

10 JUDGE CLIFTON: All right. Let's  
11 take just a moment for people to look at 7,  
12 and then I'll see if there's any objection.

13 Now, 7 is beautifully marked for  
14 the purposes of the record. It is a 13 page  
15 document, and the numbers are in that  
16 sequence. They are marked properly for the  
17 exhibit. Is there any objection to Exhibit 6  
18 being admitted into evidence?

19 MR. HILL: No.

20 JUDGE CLIFTON: Exhibit 6 is  
21 admitted.

22 (Whereupon Exhibit No. 6 was

1 admitted into evidence.)

2 JUDGE CLIFTON: Is there any  
3 objection to Exhibit 7 being admitted into  
4 evidence?

5 MR. HILL: No objection, but we'd  
6 like to ask a couple questions first.

7 JUDGE CLIFTON: You may. Now, let  
8 me ask. Do you want, I'm going to give you  
9 two shots at questions. One would be voir  
10 dire questions, to be clear of things before  
11 you decide whether to object to the exhibit.  
12 The other would be cross examination  
13 questions, which could be done after the  
14 exhibit comes in.

15 MR. HILL: We won't object. We'll  
16 just ask cross examine questions.

17 JUDGE CLIFTON: All right.  
18 Exhibit 7 is admitted into evidence.

19 (Whereupon Exhibit No. 7 was  
20 admitted into evidence.)

21 JUDGE CLIFTON: Ms. Deskins?

22 MS. DESKINS: I have no further

1 questions of the witness.

2 JUDGE CLIFTON: Mr. Hill, you may  
3 cross examine.

4 EXAMINATION

5 BY MR. HILL

6 Q Your Honor, if I may, Mr.  
7 McFetridge, the data you presented on the  
8 graphs is referenced as source from the USDA  
9 NASS Information.

10 A Yes.

11 Q So, have you just compiled the  
12 data that they present? You haven't  
13 independently verified the information that's  
14 on those charts, is that correct?

15 A No, everything is from the NASS  
16 Publications.

17 Q Okay. And with respect to the  
18 acreage chart, for example, do you know how  
19 they captured that information?

20 A I'm not specifically certain how  
21 they captured it. Like I said, I just took  
22 the NASS Publication, and used the values that

1 NASS had.

2 Q Thank you. Oh, may I ask one  
3 other question?

4 JUDGE CLIFTON: Certainly.

5 BY MR. HILL:

6 Q And this is just for my  
7 edification, I guess. In your testimony, you  
8 indicated that in your third paragraph, it  
9 says the Department is taking a neutral  
10 position. Is that meant to mean that the USDA  
11 in its entirety is taking a neutral position  
12 or is the Economic Branch taking a neutral  
13 position? Or are they one in the same?

14 A I would say that the Department  
15 has taken a neutral position.

16 Q Thank you.

17 JUDGE CLIFTON: Is there any cross  
18 examination from anyone else? This is a, this  
19 is very much like a public meeting, and so the  
20 leaders go forward, but they're not the only  
21 people that participate. And if anyone has a  
22 question for Mr. McFetridge, I would invite

1 you to come up and ask it.

2 All right. I see no other cross  
3 examination. Is there any redirect?

4 MS. DESKINS: I have no further  
5 questions.

6 JUDGE CLIFTON: All right. Is  
7 there anything you wanted to add, Mr.  
8 McFetridge?

9 THE WITNESS: No.

10 JUDGE CLIFTON: All right. Thank  
11 you, you may step down.

12 And, you may call your next  
13 witness, Ms. Deskins.

14 MS. DESKINS: I have no further  
15 witnesses.

16 JUDGE CLIFTON: All right. Thank  
17 you. Mr. Hill, would you like some time or a  
18 short little break, or would you like to go?

19 MR. HILL: We're ready.

20 JUDGE CLIFTON: All right, you may  
21 call your first witness.

22 MR. HILL: I'd like to call Tom

1 Facer.

2 JUDGE CLIFTON: Yes, I would like  
3 a copy, thank you. And have you given the  
4 record copy to this lady now, or does the  
5 witness have a record copy?

6 MR. HILL: I made ten copies.

7 JUDGE CLIFTON: All right, then we  
8 would be marking this as Exhibit 8?

9 MR. HILL: Yes.

10 (Whereupon Exhibit 8 was marked  
11 for identification.)

12 JUDGE CLIFTON: And, Mr. Facer,  
13 state your whole name and spell it for us,  
14 please.

15 THE WITNESS: My name is Thomas  
16 Facer, T-h-o-m-a-s, F-a-c-e-r.

17 Whereupon,

18 THOMAS FACER,  
19 called as a witness herein, having been first  
20 duly sworn, was examined and testified as  
21 follows:

22 JUDGE CLIFTON: Thank you. Mr.

1 Hill, you may proceed.

2 EXAMINATION

3 BY MR. HEDIN:

4 Q Yes, Mr. Facer, you have a  
5 statement that you prepared, correct?

6 A Yes, I do.

7 Q You can talk whenever you'd like  
8 to.

9 A Okay. My name is Thomas Facer.  
10 I'm here today to testify in favor of the  
11 proposed Amendment to the Federal Tart Market,  
12 Federal Marketing Order for Tart Cherries. I  
13 represent New York State as the lone  
14 representative to the Board.

15 I have served on the CIAB Board  
16 since its inception, either as board member or  
17 as an alternate board member, and have served  
18 as Treasurer and currently serve as its  
19 Chairman.

20 There is only one stated purpose  
21 for the Federal, for the Tart Cherry Marketing  
22 Order as published in the Federal Record, that

1 is, to increase the value of cherries to  
2 growers.

3 The current manner in which  
4 diversion credits generated from the unfarmed  
5 destruction of cherries by growers, are  
6 accounted for. It does support the stated  
7 purpose of the Marketing Order.

8 Tart Cherry Production has  
9 historically been variable to the weather  
10 conditions, which has led to highly variable  
11 grower pricing and marketing conditions, as  
12 you've just seen in the graphs.

13 When the Marketing Order was  
14 initially developed and promulgated, the  
15 economic theory supporting the improvement in  
16 grower returns, was to control the supply of  
17 cherry products, marketed into the domestic  
18 tart cherry market. By controlling the supply  
19 available to the market each year, supply  
20 could be stabilized and grower returns would  
21 be stabilized.

22 The handlers of the tart cherry

1 crop are regulated, by restricting the sales  
2 the handler could make into the domestic  
3 market, to a percentage of a "free tonnage",  
4 established by the formula, for the entire  
5 industry, based on crop size, carry over  
6 inventory and prior three year average sales,  
7 industry domestic sales.

8 The handlers have the burden of  
9 proof, to provide documentation that the  
10 "restricted volume of cherries a handler  
11 handled, commonly referred to as the handle,  
12 was kept out of the domestic market. The  
13 primary supply control mechanism used, allowed  
14 handlers to place product into a 50,000 pound  
15 reserve inventory, to be used during years of  
16 low crop production, to stabilize supply.  
17 These reserve inventories would be released  
18 during low crop years, and replenished in high  
19 crop years, thus stabilizing supply and grower  
20 pricing.

21 The marketing order also allowed  
22 handlers to obtain credits towards their

1 restricted volume by, for exporting products,  
2 exporting products outside of North America,  
3 and to apply for a diversion of credits for  
4 new products or new markets, up to a 5,000,000  
5 pound maximum per season. And that was  
6 industry-wide.

7 The final method allowed to  
8 satisfy regulation requirements, was for  
9 growers to destroy cherries in the orchard and  
10 obtain grower diversion credits. Handlers  
11 needed to obtain these credits, to use to  
12 satisfy regulation.

13 The Marketing Order was presented  
14 to the industry with several examples showing  
15 a stabilization of lower pricing of  
16 approximately 25 cents per pound, and in large  
17 crop years, a regulation percentage of 25  
18 percent. The industry adopted the Marketing  
19 Order by a significant margin of both growers  
20 and handlers.

21 Since the initial adoption of the  
22 order, there have been several modifications

1 to improve the order, both by formal and  
2 informal rule making. Over that same time,  
3 there have been many exchanges in the  
4 consumption patterns of cherry consumers.  
5 Unfortunately, since the promulgation of the  
6 Marketing Order, regulation has in many years,  
7 been much higher than the 25 percent expected,  
8 and grower returns in those years has been  
9 much less than the 25 cents they anticipated.

10 There are many reasons for the  
11 increased regulation percentage that are  
12 really not relevant to the discussion of this  
13 amendment. However, as the regulation  
14 percentage increases, the use of orchard  
15 diversion is discouraged, rather than  
16 encouraged, as originally intended. And I  
17 would add something that's not in my  
18 testimony, that I've since then.

19 I would argue that, if this was  
20 anticipated, if this result was anticipated  
21 when the original order was promulgated by the  
22 industry, that it would never have been

1 passed. The agreement, or all the examples  
2 that were shown to the industry, show that in  
3 a bad year, a bad year being a very large  
4 crop, we could have to destroy 20, you know,  
5 we would have to regulate 25 percent. We  
6 never had examples as high as we have seen.

7           Going back to my written, however,  
8 as the regulation percentage increases, the  
9 use of orchard diversion is discouraged rather  
10 than encouraged, as originally intended. All  
11 regulation of the Marketing Order is at the  
12 handler level, and handlers have been required  
13 to include all orchard diversion certificates  
14 received from growers, as part of their  
15 handle.

16           To this handle, the regulation  
17 percentage is assessed. The best way to  
18 understand this is to look at the example on  
19 the back of your, on the last page, is an  
20 example I put together, that what happens is,  
21 an individual handler utilizes orchard  
22 diversion certificates to satisfy regulation

1 requirements. In this example, the handler,  
2 this is one handler, has domestic customers  
3 that purchase on an annual basis, the products  
4 that produces, that require ten million pounds  
5 of cherries to produce that item. The handler  
6 has no export business, and has qualified for  
7 one million pounds of new product activity.

8 The products the handler produces  
9 have a shelf life of 18 months, which is  
10 relevant in the reserve situation. The  
11 handler plans to participate in the 50 million  
12 pound primary reserve, but does not want to  
13 participate in any secondary reserve, due to  
14 the shelf life of its products.

15 As you can see in the example, as  
16 the crop size increases, the regulation  
17 increases, and the quantity of grower  
18 diversion certificates required from the  
19 handler to satisfy regulation requirements,  
20 increases, disproportioned to the regulation  
21 increase. And the best way, in the  
22 top half, is the way the current structure

1 works. The first line is, and I've  
2 abbreviated the formula a little bit to keep  
3 the lines somewhat limited, but the top line  
4 is the National Regulation plus an anticipated  
5 carryover 50 million pounds, which has been in  
6 the historic in the order since we started.

7 So, if you could look at it as  
8 crop sizes, the first column is 150 million  
9 pound cherry crop, plus 50 million in the  
10 carryover, the second column 225 plus 50, the  
11 third column 300 million, plus 50. Certainly,  
12 we've had crops smaller than 150 and we've had  
13 crops larger than 300.

14 I made the assumption in this that  
15 when there's a small crop, there's no orchard  
16 destruction. When there's a medium crop,  
17 there's a little bit of destruction, and in a  
18 larger crop there's more. The regulation  
19 percentage that would result in those,  
20 assuming that the non-regulated areas of the  
21 country would produce about ten million  
22 pounds, the first year the regulation the 20

1 percent, the second example is 42, and the  
2 third is 54.

3 As I mentioned, the handler needed  
4 to process ten million pounds to satisfy his  
5 customer's requirements, and with a, in the  
6 first column with a 20 percent regulation,  
7 that handler would have eight million pounds  
8 of product to sell, remembering he has  
9 customers for ten. In the second column, he  
10 would have 5.8 million to sell, and in the  
11 third column, 4.6.

12 As we mentioned, the customer  
13 needs, in the next section, the customer needs  
14 ten million pounds to satisfy their customers,  
15 nine we'll call conventional, and one million  
16 that have qualified for new product products,  
17 coming to the total of the ten million sales.  
18 He has eight million available to sell, in the  
19 first column he has eight million available to  
20 sell, he gets a credit for the one million of  
21 new product, which means he's short a million  
22 pounds that he's got to produce, product that

1 he can't sell, and has to meet regulation.

2 The next section are the options  
3 available. We already mentioned that the  
4 processor would participate in the primary  
5 reserve, which is 100,000 pounds, his share,  
6 and the other options are to require growers  
7 to put fruit on the ground, or purchase export  
8 products from others that have excess, or  
9 purchase excess new product products from  
10 others. And as you can see in the example, if  
11 grower diversion certificates is the option to  
12 use, in the small crop year, which is unlikely  
13 that we would destroy anything, it takes 1.2  
14 million pounds to satisfy the one million  
15 pound shortfall.

16 In the 350 million crop example,  
17 the process, or handler is 4.4 million pounds  
18 short to satisfy his customers. They can't,  
19 that he's processed, he can't sell. If he was  
20 to put, if he was to require growers to put  
21 fruit on the ground, it would require 9.4  
22 million pounds of fruit to be put on the

1 ground to satisfy that requirement.

2 If he bought credits, it would be  
3 4.3, assuming in all cases that he put a  
4 million, or 100,000 pounds in primary reserve.

5 Go back to the written testimony,  
6 growers will not destroy fruit in the orchard  
7 when other processors will accept the fruit.  
8 And as a result, growers then require payment  
9 for destruction. Handlers who have excess  
10 export and new product credits also sell those  
11 products to handlers who need them.

12 In this example, I'll not read it,  
13 which I've already mentioned, 200 million  
14 pound product, which is below national  
15 consumption, the regulation percentage is 20  
16 percent, but the handler cannot sell one  
17 million pound equivalent of its production to  
18 customers, that expect the product, unless the  
19 handler covers the regulation requirement in  
20 some other manner.

21 With a crop less than the national  
22 consumption, it's not reasonable to destroy

1 cherries in the orchard, but if that were the  
2 only option the handler had, they would  
3 require to destroy 1.2 million pounds, to free  
4 up the million pounds of product. As the crop  
5 gets larger, in the example, the quantity of  
6 grower diversions needed rises much quicker  
7 than the shortfall and sales opportunity.

8           When the crop reaches 300 million  
9 pounds, plus the 50 million pound carryover,  
10 an example the quantity of grower diversions  
11 required to satisfy the 4.4 million pound  
12 regulation requirement, grows to 9.4 million  
13 pounds.

14           As an example, one of the handlers  
15 that I've worked with had the following  
16 experience in 2009. The 2009 share crop was  
17 large, and there was carryover from 2008 that  
18 resulted in a 68 percent regulation, leaving  
19 only 32 percent available to sell to their  
20 customers. The handler required some growers  
21 they dealt with to destroy a portion of the  
22 fruit in the orchard, which they paid the

1 grower five cents a pound for the fruit  
2 destroyed. The growers were paid 15 cents per  
3 pound for the crop that was harvested and  
4 delivered.

5 The growers the handler deals  
6 with, did not have enough fruit on their farms  
7 to meet the handler's sales requirements, plus  
8 destroy the amount of fruit necessary to meet  
9 the obligations. As you can see, if this  
10 handler was, if this handler was in this  
11 example, we actually had 60, rather than 54  
12 percent in the one example, we have 68. So  
13 you can imagine that the amount the grower, of  
14 grower certificates needed, would have been in  
15 excess of 9.4, plus the ten million pounds  
16 that they needed for their sales.

17 This forced the handler to  
18 purchase excess credits from other handlers  
19 and purchase cherry products that they did not  
20 market, to place into reserve. They were  
21 successful in a sealed bid offer to purchase  
22 credits for 20 cents a pound, and were

1 unsuccessful in all attempts less than 20.

2 If the stated purpose of the  
3 Marketing Order is to improve cherry grower  
4 returns, I suggest this example points out  
5 that there is a problem with the system.

6 The proposed amendment addresses  
7 the current inequity in the utilization of  
8 grower diversion credits, by allowing the  
9 handler to use them in an equal basis with  
10 other diversion activities. This will remove  
11 the current disincentive to destroy fruit when  
12 the regulation requirement is very high, due  
13 to larger crops and/or excessive free carry  
14 over from prior years.

15 The entire industry will realize a  
16 slightly higher regulation percentage with  
17 this amendment, but the quantity of tonnage  
18 available to be marketed will be the same as  
19 it is without the amendment change.

20 Undoubtedly, handlers who typically generated  
21 excess diversion credits, will pose the  
22 amendment change.

1 I argue the windfall they have  
2 realized under the current method of handling  
3 grower diversions, does not fit the purpose of  
4 the Marketing Order. With this change I  
5 suggest grower returns will improve, as it was  
6 first envisioned with the original  
7 implementation of the Marketing Order.

8 In years when crop size is small  
9 to larger, there is unlikely a need to destroy  
10 fruit in the orchard. That does not change  
11 with this amendment. However, when there is  
12 a very large supply, crop size and/or  
13 carryover, some handlers will offer much  
14 higher payments to growers to destroy fruit,  
15 than has been experienced to date with the  
16 Marketing Order for the reasons I have already  
17 stated.

18 These payments for destruction  
19 will entice growers to destroy more fruit than  
20 has been destroyed in the past. In the past,  
21 the fruit that will now be destroyed, was in  
22 the secondary reserve pool. This excessive

1 reserve inventory cost the industry carrying  
2 costs, plus in most cases, frozen storage  
3 costs, plus some market value depression on  
4 the free market. These expenses will be  
5 saved, and market prices will be a bit less  
6 depressed, ultimately to higher grower  
7 returns.

8 Over time, production must be in  
9 line with consumption. The industry cannot  
10 produce more than is consumer. The change  
11 this amendment makes to the Marketing Order  
12 will aid in bringing the production,  
13 consumption closer to balance over time, and  
14 allow growers to realize increased returns.

15 On the bottom of the example, is  
16 the same information restated in the manner it  
17 would be handled with this amendment. And the  
18 only difference, as you'll notice, is that the  
19 regulation percentage does go up a little bit  
20 in the bigger crop years, and the need for  
21 more diversion certificates goes down, in the  
22 bottom. And the need for export credits, or

1 new product credits, could go up, actually  
2 goes up a little bit. But, the biggest change  
3 is a slight increase in regulation, but the  
4 significant increase, or decrease in the  
5 amount of diversion certificates that are  
6 required, thus increasing their value.

7 That's the completion of my  
8 testimony.

9 JUDGE CLIFTON: Thank you, Mr.  
10 Facer. Let's begin with what I'll call direct  
11 examination. Would anyone at Mr. Hill's table  
12 like to ask some clarifying questions or any  
13 kind of questions?

14 MR. HEDIN: Yes, your Honor, we  
15 would. Can we be informal and say Tom instead  
16 of Mr. Facer?

17 JUDGE CLIFTON: You may.

18 MR. FACER: I'll answer either  
19 way.

20 BY MR. HEDIN:

21 Q Tom, during your discussion, you  
22 talked about 18 months in an inventory

1 reserves. Could you explain a little bit more  
2 what you mean by that?

3 A Sure. The question asked is, is  
4 my comment, and I specifically commented on  
5 the products that this handler makes, have a  
6 shelf life of 18 months. Several of the  
7 consumer products that are packed in the  
8 industry, have a limited shelf life. The way  
9 the inventory reserves were in the market  
10 order, I've referred to a 50 million pound  
11 primary reserve. That is compared with a  
12 secondary reserve, those being a hierarchy of  
13 potential release.

14 The 50 million pound reserve, can  
15 be released with a USDA purchase, and be  
16 released by handler exporting or making new  
17 products, and historically, the primary  
18 reserve, and you have the ability within the  
19 primary reserve to rotate products in and out.

20 So the industry has had the  
21 ability and has had the experience that the  
22 primary reserve does rotate, and you

1       theoretically could put some consumer products  
2       in that reserve, with the comfort that you  
3       could likely get them out within the time that  
4       they would, the product would still be  
5       salable.

6                 Secondary reserve, however, is  
7       secondary by nature to the primary reserve,  
8       and there's no guarantee of when or if that  
9       product will actually get released. So, in  
10      this example, where the processor is only  
11      processing products that have a relatively  
12      short shelf life, it just is impractical to  
13      put down there.

14                Q       In your example, Tom, it talks  
15      about the need for a significantly greater  
16      orchard diversions, to satisfy the  
17      restriction. Can you explain for us in a  
18      little bit more detail, how those orchard  
19      diversions are currently accounted for and why  
20      the numbers get so big?

21                A       The question of how, why the  
22      inverse relationship, I guess, to the crops,

1 as the crop gets bigger, the requirement for  
2 diversion increases. And the way the order is  
3 currently accounted for, if you will, is that  
4 the, as I mentioned, the handler is the entity  
5 that gets regulated. So, the handler,  
6 everything, all cherry volume has to funnel  
7 through a handler. So, the diversion, any  
8 orchard diversion has to go through a handler  
9 to be counted, along with the products that it  
10 processes. And to that, the regulation, and  
11 the surplus is determined, the surplus in the  
12 industry is determined and a percentage is  
13 applied to that "handle".

14 So, as the regulation percentage  
15 or requirement goes up, and you have to  
16 include that, a handler has to include those  
17 orchard diversions in their handle, you're  
18 regulating the regulated. And in my  
19 testimony, I mentioned in 2009, when there was  
20 a 68 percent regulation, orchard diversion  
21 credits that were really intended, initially,  
22 to take some product, to destroy some product

1 to meet regulation, only 32 percent of that  
2 was actually destroyed because it had to be  
3 recounted, or had to be regulated again, if  
4 you will.

5 So, the intent was, the intent  
6 initially was that in these big crop years, we  
7 would remove some product, leave it in the  
8 orchard, but we never envisioned a 68 percent  
9 regulation. It was never, ever thought of,  
10 that it could, I mean, 25 was scary back when  
11 we promulgated the order.

12 Q Is there a point at which it  
13 becomes impractical to do orchard diversion?

14 A Well, I mean, in 2009, in 2009  
15 there was a fair amount of, there was a fair  
16 amount of regulation done nationwide.  
17 However, a larger portion of that was done in  
18 an area where, it was done in one area, don't  
19 exactly know all the reasons for it. But, in  
20 the other areas, it was, you know, the other  
21 handlers felt it was impractical to do a lot,  
22 because it, you didn't get anything for it.

1 And growers would require some payment. It  
2 was politically unacceptable.

3 MR. HEDIN: That's all I have,  
4 your Honor. Thank you.

5 JUDGE CLIFTON: Did you have any  
6 questions of this witness, Mr. Hill?

7 MR. HILL: Not at this time, your  
8 Honor, no.

9 JUDGE CLIFTON: All right. I  
10 would like to open up questioning by anyone  
11 who has questions for Mr. Facer.

12 EXAMINATION

13 BY MR. ENGELER:

14 Q Good morning, Mr. Facer, and thank  
15 you for your testimony here today. I have a  
16 couple questions I'd like to ask you.

17 First of all, I don't know if you  
18 said it in your testimony, I didn't hear it,  
19 but are you a grower or a handler in the  
20 industry? What is your --

21 A A handler.

22 Q You're a handler, okay. And you

1 talked a lot about the grower diversion  
2 certificates and what not, but could you just  
3 briefly explain to us how that grower  
4 diversion process works, if a grower diverts  
5 cherries, or puts cherries on the ground, as  
6 you said, in the orchard, then what happens  
7 from that point forward? Is a diversion  
8 certificate, just the process.

9 A Just the process, okay. The  
10 question of the process, in the order, within  
11 the mechanism of the order, there are at least  
12 three different mechanisms that can be  
13 utilized or processes that can be utilized for  
14 a grower to put fruit on the ground. The  
15 least used is called Random Low, where the  
16 grower at the beginning of the season says,  
17 I'm going to leave 25 percent of my fruit in  
18 the orchard.

19 The CIAB has maps of all of the  
20 growers, growers are not regulated, growers  
21 are not required to map their orchards,  
22 because it's a handler order. So, the growers

1 are not formally regulated. If growers want  
2 to destroy fruit in their orchards, they can  
3 voluntarily map their orchards with CIAB, so  
4 that they're in, that starts the process, I  
5 guess, is a map.

6 So, they have map, CIAB has a map  
7 of the grower's orchards, with all the number  
8 of trees and the number of rows and the acres,  
9 and except for age. One mechanism is, the  
10 grower can say I want a random row, which  
11 means I'm going to, 25, I'm going to random  
12 row 25 percent. He would get a map from CIAB  
13 that specifies which 25 percent of the trees  
14 he cannot harvest. The CIAB has compliance  
15 officers in all the areas that check on the  
16 compliance. Did he actually leave 25 percent  
17 of his trees undone. That's one mechanism.

18 Another mechanism is that they can  
19 choose to abandon an entire block of fruits.  
20 My orchard on such and such road, I'm going to  
21 leave the whole thing. Again, it's mapped, so  
22 that they go in and the map, they get a map

1 from CIAB that gives the grower and the  
2 compliance officer, a statistically chosen  
3 sampling of trees, they go in and harvest  
4 those trees, weigh the fruit, and extrapolate  
5 it to the whole block, to come up with a  
6 value.

7 And the other mechanism that's  
8 sometimes used is a partial block, where  
9 they'll just do a part of a block, that  
10 they've done that with the same mechanism.

11 The final way that they can do it  
12 is, they can actually harvest the fruit, and  
13 decide not to deliver it, essentially decide  
14 not to deliver, call the compliance officer  
15 and say, I've got X amount of tank, cherries  
16 are typically harvested in tanks with water,  
17 I've got this many tanks of cherries that I  
18 would like to destroy and never deliver.

19 And the compliance officer comes  
20 out and certifies that they actually were  
21 destroyed and, but you know, like in all those  
22 cases, the CIAB office will generate a

1 certificate that says Grower A destroyed X  
2 pounds of cherries. That certificate gets  
3 issued to the grower, but it is of no value  
4 until, it's not recognized until it's in the  
5 handler's hand. So, the handler has to get  
6 that to meet its regulation, if it wants to do  
7 that. But it's a process.

8 Q Okay, so the grower will redeem  
9 the certificate with the handler, correct, and  
10 then the handler can, can the handler use that  
11 to satisfy a portion of his restriction  
12 obligation for that?

13 A Yes, yes.

14 Q Is that how he does it?

15 A Yes. And as I pointed out in the  
16 example, you know, that's one of the options  
17 it has. Doesn't have to, just an option.

18 Q All right. And in the past, has  
19 there been a lot of grower diversion activity  
20 in your --

21 A There hasn't been, in low crop  
22 years, there's been very, very little. In

1 lower crop years, the only destruction that  
2 has been done has been due to quality reasons,  
3 you know, just, it was marketable fruit, but  
4 it wasn't the greatest fruit. It had some  
5 problem, and would get destroyed.

6 In the bigger crop years, and  
7 we're really have two of them, 2009 being the  
8 most recently, it was the intention of people,  
9 to divert fruit in the orchard, and the  
10 initial regulation, the initial regulation,  
11 the year I don't exactly remember. I think it  
12 was, suggested it was going to be in the low  
13 sixties. But as the crop started to pick out  
14 long, I mean, the crop got larger, and the way  
15 the Marketing Order works, is in June, we  
16 establish a preliminary percentage of what the  
17 estimate crop size, the estimated carryover,  
18 in an estimated percentage. And then in  
19 September, we establish the final.

20 The crop was estimated that year,  
21 I think, at about 280 million pounds. We had  
22 a 50 million pound carryover as a round

1 number. And it became obvious, after  
2 partially made it through the harvest, that  
3 the crop was actually going to be bigger, not  
4 smaller. They ended up, I think, picking 320  
5 some million pounds, and what actually  
6 happened that year, in the year when you would  
7 anticipate as the crop gets bigger, you would  
8 put some more fruit on the ground, there was  
9 less fruit put on the ground, because of the  
10 penalty the handler would have to take, you  
11 know, it went from you're going to be able to  
12 use 40 percent of it, to only using 32 percent  
13 of it towards regulation. It was actually  
14 discouragement for putting fruit on the  
15 ground.

16 And as a result, we had a very  
17 large carryover, we put an enormous amount of  
18 food in reserve. And we're still, we're  
19 sitting here in 2011, and some of that  
20 product's still in secondary reserve, after  
21 having a very short crop in 2010.

22 Q Now, when you talk about, there's

1 a penalty for, when there's a large crop and  
2 there's a penalty, you mentioned a penalty for  
3 when handlers acquire those grower diversion  
4 certificates, are you referring to the fact  
5 that volume regulation percentages apply to  
6 the certificates --

7 A Yes, yes, the penalty is that, you  
8 know, you anticipated that they were going to  
9 have this value, but they had less value.

10 Q Okay.

11 A It's not a penalty, it's a  
12 perceived penalty more than a --

13 Q And would you, would it be  
14 accurate, or I'll ask the question like this.  
15 Do you believe that that provides the  
16 disincentive in those high crop years for  
17 growers to divert, because handlers might be  
18 less likely to acquire the diversion  
19 certificates from the growers?

20 A Absolutely, absolutely.

21 Q And you believe that these  
22 proposed amendments, that this disincentive

1 would be removed?

2           A       Yes, I believe, yes, I do. I  
3 mean, just in looking at the example, in the  
4 big crop year that we had in the final column,  
5 nothing in the top, I mean, this handler that  
6 I use, this fictitious handler, in the current  
7 structure, they've got a 4.4 million pound  
8 shortfall that they've got to satisfy. In the  
9 proposed structure, the regulation does go up,  
10 you know, there's no question it goes up. It  
11 affects that handler by 200,000 pounds. I  
12 mean, they have 200,000 pounds less to sell,  
13 because of that. However, if they use grower  
14 diversion certificates as an option, the  
15 amount they need goes from 9.4 million pounds  
16 down to 4.7, which has to mean more value.

17                       My example, the example I used,  
18 where the handler I helped was working with  
19 pay a nickel for, grower has to put the fruit  
20 on the ground, and pay 20 cents for expert  
21 certificates. If you do the math at 68  
22 percent, that nickel that they paid, I think,

1 equates to 17 or 18 cents, you know, for the  
2 value.

3           Afterwards, the other way of  
4 looking at it, if we had known that, you know,  
5 the certificates were bought in, you know,  
6 April, following the harvest, if we had known  
7 the certificates were going to cost 20 cents  
8 there, we could have paid six or seven for, to  
9 the grower, but no more than that.

10           Q       Okay, and I need just a couple  
11 more.

12           A       No problem.

13           Q       You discussed a little bit about  
14 the impact that these proposed amendments  
15 would have on the volume control percentages,  
16 and you indicated that the, you know, the  
17 final percentages of grower diversion, if  
18 these amendments go through, grower diversion  
19 is accounted for in the form that the, that  
20 the restricted percentage would increase,  
21 correct?

22           A       The restricted percentage will

1 increase, the restricted volume will not  
2 change.

3 Q Okay. We'll get to that in a  
4 minute. But, would the preliminary  
5 percentages be affected at all by this, these  
6 proposed amendments?

7 A I believe the, I believe the  
8 grower would be remiss if they didn't  
9 anticipate some in their, in their generation  
10 of the initial regulation. If it's a very  
11 large crop year, knowing how the formula would  
12 work in the revised structure, I think the  
13 Board would be, I think the Board would be  
14 remiss in not addressing that. And certainly  
15 there would be a way that they could address  
16 that.

17 But that's again, would be a Board  
18 decision, when the initial is done. But it  
19 certainly could be, anyway, because you would  
20 have to anticipate a number that would be  
21 destroyed. And no different than we have to  
22 estimate a number that's going to actually be

1 harvested, you know, that's going to --

2 Q So, are you saying that the grower  
3 diversions would be factored into the  
4 preliminary percentages?

5 A My opinion is they should be, and  
6 they certainly could be. It's my opinion they  
7 should be. It's certainly, procedurally they  
8 could be.

9 Q All right. Thank you. Just one  
10 other thing here. Well, let's follow up on  
11 your response a minute ago. You said that a  
12 certain percentage would increase, but the  
13 volume, the certain tonnage would not  
14 increase. Could you explain that a little  
15 bit?

16 A Well, the formula really says, I  
17 mean, if you dissect the formula, the formula  
18 says that we have to put on the market 110  
19 percent of prior three year sales. That's the  
20 base. That doesn't change. That's not going  
21 to change, regardless of what we do with this.  
22 So, if we had sold, pick a number, if we have

1 sold 140 million pounds of cherries in the  
2 domestic market, on average, the last three  
3 years, we're going to put 154 million pounds  
4 of cherries on the market that next year.  
5 That doesn't change.

6 So, anything over, anything in  
7 excess of that 154 million pounds in the  
8 example, is, has to be regulated, is regulated  
9 tonnage. So, it's a matter of, you know, what  
10 are you going to divide by, what number.

11 So, the amount of fruit, and I  
12 think the important thing is, the amount of  
13 fruit put onto the domestic market, is really  
14 what the Marketing Order is trying to do.  
15 Doesn't change. It's 110 percent of the prior  
16 three year average sales.

17 Q But if their circuit percentages  
18 increase, would that not reduce the amount of  
19 free tonnage that would be available to  
20 handlers?

21 A It can't. It can't because, as I  
22 said, the base is, we have to supply 110

1 percent to the , we have to supply 110 percent  
2 to the, we have to supply 110 percent of the  
3 prior three year average sales to the market.  
4 That's number one. How do you get there? The  
5 percentage is just a matter of that number,  
6 divided by whatever we're using for the  
7 available crop, the total crop or the  
8 harvested crop.

9 But the base number is the amount  
10 of fruit that we're putting on the market  
11 here. That can't change. Anything over and  
12 above that is regulated volume, and then it's  
13 just determining the percentage is a matter of  
14 what you divide that number by. Whether you  
15 divide it by 320 million pounds, or whether  
16 you divide it by 300 million pounds.  
17 Percentages change, but the amount of fruit  
18 doesn't change.

19 Q Now, since grower diversion  
20 certificates can be used to satisfy a portion  
21 of the recert and obligation, would that  
22 theoretically, as a handler, for using those

1 grower diversion certificates to satisfy a  
2 portion of the obligation, would that free up  
3 reserve, the cherries in reserve that you'd be  
4 able to then market as your own free tonnage?

5 In other words, because you're  
6 using grower diversion certificates to offset  
7 part of your obligation, does that make more  
8 of the, some of those reserve cherries  
9 available to you, to sell, as a handler?

10 MR. HEDIN: Can I ask a point of  
11 clarification? Reserve cherries are a  
12 specific thing, in the order, and that's what  
13 handlers have set aside from prior years. Can  
14 we, I think, are you asking about restricted  
15 cherries or release of reserves?

16 BY MR. ENGELER:

17 Q Restricted cherries.

18 A Well, certainly, the way you  
19 originally asked the question was, if you use  
20 grower diversion, would it free up reserve.  
21 And as Perry pointed out, reserve has been  
22 established in the prior year, and yes, you

1 can use grower diversions to release that, if  
2 you over, going to go over-regulate in a given  
3 year.

4 So yes, you could do that. That  
5 hasn't happened, because we've had such high  
6 regulations to deal with on an annual basis,  
7 but it is possible. But certainly using, I  
8 mean, grower diversions is just one of the  
9 tools that exists to satisfy regulation  
10 volume. And, I guess, using them, I guess you  
11 could look at it any way. If you divert,  
12 obviously if you divert cherries on the  
13 ground, you're not going to sell them. And,  
14 you only will do that, I mean, you only will  
15 do that in the very large crop years. It's a  
16 question of what makes the most sense.

17 But you can, but initially your  
18 question was, can you use growers to get  
19 stuff, can you use diversions to get product  
20 out of reserve. Yeah, you can, if you over,  
21 actually use it for over regulate.

22 Q Okay. Just one final question.

1 In the proposal here, there are actually three  
2 proposed amendments to three different  
3 sections of the Marketing Order, and is it  
4 your understanding that the intent of these  
5 three separate amendments are all geared  
6 towards correcting this, or addressing the  
7 same issue?

8 A Yes, yes.

9 MR. ENGELER: Thank you. That's  
10 all I have.

11 JUDGE CLIFTON: Thank you, Mr.  
12 Engeler. Who else?

13 MS. SALEHI: If I may.

14 JUDGE CLIFTON: Ms. Salehi.

15 EXAMINATION

16 BY MS. SALEHI:

17 Q Good morning Mr. Facer.

18 A Morning.

19 Q My name is Parisa Salehi, and I'm  
20 also with MOAB, Marketing Order Administration  
21 Branch. I just have two questions for you.

22 A Okay.

1           Q       The one question I have is that as  
2           a handler, when you have growers who  
3           participate in the grower diversion  
4           certification, how are their restricted and  
5           free percentages affected. And then what  
6           about growers who do not participate in that  
7           program?

8           A       Well, I think your question is,  
9           how are the growers affected? The growers are  
10          not regulated.

11          Q       No, how are, I'm sorry, as a  
12          handler whose grower is participating in the  
13          grower diversion program.

14          A       Okay, okay.

15          Q       How is the restricted and the free  
16          percentages affected for them?

17          A       Your question is how are the free  
18          and restricted affected. Every handler that  
19          purchased cherries in the regulated districts,  
20          has the same percentage of regulation.

21          Q       Okay.

22          A       And grower diversions is just one

1 of the mechanisms they can use to satisfy it.  
2 So, if you, if handler A said, I'm going to  
3 require, I'm going to get all of my restricted  
4 requirements from growers, and handler B says,  
5 I'm going to get all of my restricted  
6 requirements by exporting, the amount they  
7 have to restrict is no different.

8 Q Okay.

9 A So, it's just one of the  
10 mechanisms available.

11 Q Okay. And my second question is,  
12 I just wanted to sort of take you back and ask  
13 you about whether you attended an industry  
14 meeting where these proposed amendments were  
15 discussed, and if you could describe how that  
16 meeting was like?

17 A These proposed amendments?

18 Q Yes.

19 A Well, as a chairman, I've been at  
20 several meetings where they've been discussed.

21 Q Okay. If you could describe for  
22 us the general, whether there was general

1 industry support, or how those meetings went?

2 A We discussed these amendments are  
3 many Board meetings. They were first brought  
4 up in the Amendment Committee that we have of  
5 the Board. They were, they've also been  
6 discussed at USDA in Washington, at a meeting  
7 we had. I would say that the overwhelming  
8 majority are in favor. There are, as I  
9 mentioned, there are some people who are not  
10 as in favor, and it's very, obviously, that  
11 they participate heavily in exports, and this  
12 undoubtedly, could lower the value of those  
13 export certificates slightly. But, that's the  
14 only, to my knowledge, those are the only  
15 oppositions that we've seen. I think our vote  
16 was 17 in favor and one abstention when we  
17 voted on it.

18 Q So, is it your opinion that  
19 generally in the industry, the belief is that  
20 if this amendment is passed, the growers and  
21 the handlers are in more of an equal footing,  
22 if you will?

1           A       Yes, certainly, if these  
2           amendments are passed, growers, in a small  
3           crop year, it makes no difference. In a very  
4           large crop, your growers will have a better  
5           opportunity. All growers will have a little  
6           better opportunity than they're had.

7           Q       Okay. That's all. Thank you.

8                    JUDGE CLIFTON: Mr. Johnson?

9           EXAMINATION

10          BY MR. JOHNSON:

11          Q       Just a couple of questions, and  
12          one clarification to your statement.

13                    You mentioned that the Board could  
14          include grower diversions in its preliminary  
15          percentage. Now, if this amendment is  
16          approved, the grower diversion certificates,  
17          that would not be included in production,  
18          correct?

19          A       Correct.

20          Q       So, would it be the intent of the  
21          industry that in its preliminary regulation to  
22          just have estimated production, since that's

1       what it's based on, estimates, during the  
2       preliminary percentage discussions?  You'll  
3       all go on estimates.  You do or do not have  
4       actual production figures?

5               A       Correct.  We go on estimates.

6               Q       You go on estimates.

7               A       You know, the preliminary  
8       percentage that's done in June, is done solely  
9       on estimates.

10              Q       So, at that time, would you have  
11       an accurate number for diversions?

12              A       It would only be conjecture on the  
13       part of the industry.

14              Q       Okay, okay.

15              A       And that's why I say, could have,  
16       you know.

17              Q       Okay.  Just wanted to clarify that  
18       for the record.

19                      Tom, I did want to go back in your  
20       testimony.  Back when the order was  
21       promulgated, you say that there was 25 cents  
22       was anticipated, 25 cents per pound.

1           A       Per pound, for the grower.

2           Q       For the grower.

3           A       Right.

4           Q       What was the cost of production,  
5           and I'm asking you to go back, what was the  
6           cost of production per pound back then and  
7           what is the cost of production per pound  
8           today, if you can answer that?

9           A       I don't have those numbers exact,  
10          but and again, the cost of production varies  
11          dramatically with crop size, because so much  
12          of the cost of production is fixed. So, crop  
13          size has a huge impact on cost per pound.

14                 Certainly, the 25 cent anticipated  
15          return, from the Marketing Order in 1997 was  
16          encouragement enough for the industry to  
17          support a Marketing Order. So, obviously, it  
18          was, 25 cents was above the cost of  
19          production.

20                 And since that time, two things  
21          have happened. Yields have increased some,  
22          and input costs have also gone up

1 substantially, between chemical costs, land  
2 costs, tree costs, and fuel costs.

3 So, certainly, 25 cents was  
4 encouragement enough in the late mid-nineties,  
5 and certainly would be less encouragement  
6 today, but I don't have the actual cost of  
7 production.

8 Q I'm going to ask you to speculate,  
9 Tom, if this again, if this amendment is  
10 approved, and grower diversions are on equal,  
11 grower diversion certificates are on equal par  
12 with handler diversion, would that, in your  
13 estimation, provide a grower with a return  
14 higher than the cost of production?

15 A Oh, it would depend on, it's  
16 really going to depend on the crop size,  
17 because there's no guarantee that the market  
18 price is, there's no guarantee market price  
19 will be higher than the cost of production.  
20 You know, there's no rule that says the  
21 purchase price of product has to be above the  
22 cost of production. Over time it has to, but

1 in a given year, it doesn't necessarily have  
2 to. But, it's certainly going to raise it.  
3 It's going to come closer. If it doesn't  
4 exceed it, it will come closer.

5 Q Okay.

6 A And part of the cost of producing  
7 fruit is harvesting it and delivering it, and  
8 the marketing cost that would be saved.

9 MR. JOHNSON: That's all.

10 JUDGE CLIFTON: Ms. Salehi?

11 EXAMINATION

12 BY MS. SALEHI:

13 Q A follow-up question about the  
14 prices that you just mentioned. I just wanted  
15 to know if the price fluctuates during the  
16 production season?

17 A The price the grower receives?

18 Q Yes.

19 A Typically not. I mean, typically,  
20 it's a very short harvest season. The harvest  
21 window for tart cherries is typically not more  
22 than 30 days.

1 Q Okay.

2 A Maybe 40 days. And in a given  
3 region, or within a given geographic area,  
4 it's like 18 to 20 days. So, it's such a  
5 short harvest, it's very, it's unusual that  
6 you will see the price change within a region.  
7 Now, the prices between regions are different.  
8 But, within a given region, they typically  
9 don't change.

10 Q Thank you.

11 A Without premium for early or late  
12 or things like that.

13 JUDGE CLIFTON: Mr. Engeler.

14 EXAMINATION

15 BY MR. ENGELER:

16 Q Yes, just a follow-up question to  
17 one that Mr. Johnson asked.

18 If the grower diversion  
19 certificates are placed on an equal par as the  
20 handler certificates, would it be your opinion  
21 that the grower return would likely be higher  
22 than if the diversion certificates were left

1 as they are now?

2 A My conjecture is that they, to  
3 answer the question about grower pricing, my  
4 conjecture is that they will, grower returns  
5 will improve for three reasons. One, in the  
6 large crop year, the value of those  
7 certificates is going to increase over what it  
8 was.

9 Secondly, because there currently  
10 is a disincentive to put fruit on the ground  
11 in the big crop year, and in a big crop year,  
12 if you harvest the fruit, it automatically, it  
13 by definition, goes into the secondary  
14 reserve, which there is no guarantee of one  
15 that's coming out.

16 In the industry, the industry  
17 typically holds its excess inventory in frozen  
18 form. Frozen storage is expensive. That  
19 burden is shared by the, that burden is a cost  
20 to the industry. That would be, there would  
21 be some less of that. And even though product  
22 is in the reserve, it's held, by definition

1       it's not available for sale. It still is  
2       reported in all USDA reports of frozen  
3       inventory, nationwide, and when anyone picks  
4       up a report that shows a very large inventory,  
5       it does nothing to help pricing.

6                So, it has to depress pricing,  
7       even if it's a little. All three of those  
8       things would be similar for our pick with this  
9       which should improve our pricing.

10            Q       Okay, thank you.

11                    JUDGE CLIFTON: Ms. Salehi?

12                    MS. SALEHI: I'm sorry, I have one  
13       more question.

14                    JUDGE CLIFTON: Certainly. No,  
15       don't be sorry.

16       EXAMINATION

17       BY MS. SALEHI:

18            Q       You stated that you're the  
19       Chairman of the current Board, is that  
20       correct?

21            A       Yes, yes.

22            Q       Perhaps in your capacity as

1 Chairman, you're privy to this information.  
2 If you are, could you please share with us,  
3 the general makeup of the industry, as far as,  
4 for example, how many handlers there are, how  
5 many growers there are, what's the average  
6 size of a grower or a handler?

7 A I am not privy to that  
8 information. There are less than a hundred  
9 handlers. I mean, I can give you  
10 generalities. Perry could probably give you  
11 a lot better numbers. But, there are less  
12 than a hundred handlers, and there are more  
13 than 500 growers nationwide. And the size is,  
14 the size of growers is, and handlers, is  
15 extremely variable. I mean, from very, very  
16 small to, there's individual handlers that  
17 would approach ten percent of the national  
18 crop. Or, individual growers and/or handlers  
19 that could approach ten percent, fifteen  
20 percent of the national crop. So, and there's  
21 large and small.

22 JUDGE CLIFTON: Mr. McFetridge?

1 EXAMINATION

2 BY MR. MC FETRIDGE:

3 Q Marc McFetridge, USDA. Good  
4 morning, Mr. Facer. I just have a few  
5 questions. One more housekeeping than  
6 anything. Based on the Small Business  
7 Administration definition of a small business,  
8 having annual receipts of less than seven  
9 million, and a small agriculture producer as  
10 having annual receipts of less than \$750,000,  
11 would you classify, how would you classify  
12 your tart cherry operation?

13 A Our operation?

14 Q Yes.

15 A That I deal with?

16 Q Uh-hum.

17 A We would be small.

18 Q Small, all right. Just to follow  
19 up with that, based on the Small Business  
20 Administration definition of a small  
21 agriculture business or grower, would you feel  
22 that these proposed amendments would have any

1       adverse affects on the small business owner or  
2       grower?

3               A       The question on the impact of  
4       small business, I would argue that these would  
5       help a small business, rather than harm a  
6       small business.

7               Q       Thank you.  Could you just give me  
8       kind of an overview of how these proposed  
9       amendments would impact your operation, as a  
10       small handler?

11              A       The handlers that, and I represent  
12       a couple different handlers that are handling  
13       fruit.  None of them are major exporters.  
14       They have relatively few new products.  So,  
15       grower diversions is a very used tool in the  
16       people that I represent, work with.  And it's  
17       been such a, you know, it's been such a  
18       disadvantage to use them, that in our  
19       situation, we would, in a large, very large  
20       crop year, we would encourage some growers to  
21       put some fruit on the ground, and the only way  
22       of encouraging them is to pay more than we

1 have in the past.

2 Q Thank you. So, getting into this  
3 topic of diversion, is diverting tart cherries  
4 in the orchard the most cost effective method  
5 of limiting surplus tart cherries, would you  
6 say?

7 A I would say it's the lowest cost.

8 Q Lowest cost. If these amendments  
9 resulted in increased grower diversions, would  
10 this reduce handler diversion activity, would  
11 you say?

12 A Other handler activity, you mean?

13 Q Yeah, handler diversion activity.

14 A Handler diversion activity as  
15 defined by export a new product development?  
16 I would doubt it. I significantly doubt it.  
17 Handlers are in business to operate their  
18 facilities and to market products. And that  
19 will, you know, that is their business, and  
20 they will continue to do that whenever  
21 possible. And as long as that economic, an  
22 economically viable operation, then doing this

1 is not going to discourage it.

2 Q I just had another quick question,  
3 just to make sure that I completely understand  
4 your figures from your testimony.

5 Looking at the current structure  
6 versus the amended structure, I just wanted to  
7 make sure I completely understand your  
8 regulation percentages. It's, so taking the  
9 350 million pound case you have in your  
10 current structure regulation percentage at  
11 being 54 percent and then the regulation  
12 percentage, the amended structure being 58  
13 percent, could you just give me a quick --

14 A Sure. In the initial, in the  
15 current structure, crop size and carry over  
16 determines, is what the surplus is divided by  
17 the crop size and carry over. And so it's,  
18 the 54 percent is the anticipated sales, and  
19 I believe I used 170 million pound, I can  
20 check my math, but 170 million pounds of  
21 sales, three year average sales plus the,  
22 three year average sales plus ten percent of

1 the 170 million, and the 350 million pound  
2 crop, I think will come up with 54 percent.

3 Q Okay.

4 A If you notice in the bottom, in my  
5 amended, I increased the orchard destruction  
6 by ten million pounds in the very large crop  
7 year to 30, and it's the same 170 million  
8 pound, three year average sales plus ten  
9 percent, divided by 320, because we don't  
10 count the 30 million pounds of destruction.  
11 But, that's the reason that the percentage  
12 goes up, because I mentioned, the volume  
13 doesn't change.

14 Q Okay. So, based on the amended  
15 structure, these proposed amendments would  
16 actually now take into account the destruction  
17 at the orchard for tart cherries, right?

18 A Restate that, I'm sorry.

19 Q No, I'm sorry. So, based on the  
20 amended structure in calculating the regulated  
21 percentages, those tart cherries that are  
22 diverted at the orchard would not be, actually

1 be counted in the calculation of the  
2 regulation?

3 A No, they're currently counted.  
4 They wouldn't be counted in the new.

5 Q Oh, they wouldn't be counted. All  
6 right.

7 A They would be, we would be  
8 determining the percentage based on the  
9 process volume, not the crop volume.

10 Q Okay. All right.

11 A And currently they are counted.

12 Q Okay. All right. Thanks for the  
13 clarification.

14 JUDGE CLIFTON: I'd like to take a  
15 ten or fifteen minute break, depending on what  
16 you would like, and have Mr. Facer return to  
17 the stand, so if there are other questions of  
18 him, you may ask them. Feel free to talk  
19 among yourselves about what he said and what  
20 that raises in your mind, and what you may  
21 think should be brought out so that it's in  
22 the testimony, in the evidence, so that as

1 this result is crafted together, it's  
2 perfectly clear what would happen. Well, as  
3 best we can.

4 All right. How many want ten  
5 minutes? How many want fifteen?

6 MR. HEDIN: Ten is fine.

7 JUDGE CLIFTON: Ten is fine.

8 Okay. It's 10:31, please be back and ready to  
9 go at 10:41.

10 (Off the record)

11 JUDGE CLIFTON: We're back on  
12 record at 10:50. Let's see. Who would like  
13 to begin with the next questions?

14 EXAMINATION

15 BY MR. HEDIN:

16 Q I'd like just to. Tom, would this  
17 amendment in any way change how handlers, what  
18 options they have to deal with restrictions?

19 A A question on what option, no, it  
20 does not change the options. Handlers have  
21 had options in the past of how to deal, and  
22 they continue to have options. It doesn't

1 change them.

2 Q So, it would just be a matter,  
3 potentially, of what they use in --

4 A Correct.

5 Q -- in restriction --

6 MR. HEDIN: I lost my train of  
7 thought. Others can proceed, your Honor,  
8 until I remember this.

9 JUDGE CLIFTON: All right. Who  
10 else has questions? While he's recalling that  
11 thought, Mr. Facer, can you think of anything  
12 that might need clarification?

13 THE WITNESS: No, not at this  
14 point right now.

15 JUDGE CLIFTON: Mr. Hedin,  
16 anything?

17 MR. HEDIN: Go ahead, I'm sorry.

18 JUDGE CLIFTON: All right. Are  
19 there any other questions for Mr. Facer from  
20 anyone? Mr. Engeler.

21 EXAMINATION

22 BY MR. ENGELER:

1           Q       Yeah, just quickly. In looking at  
2 this chart, and I was wondering if you could  
3 explain to us what calculation you used to get  
4 to the percentages here. If you did already  
5 I apologize, but I might have missed it.

6           A       I anticipated, the top line is  
7 what the national regulated crop and the  
8 projected 50 million from carry over, which is  
9 the amount, that's the part of the formula, if  
10 you will. And the regulation, I assumed a  
11 three year average domestic sales plus ten  
12 percent of 170 million. So, because we have  
13 to supply 110 percent of the prior three year  
14 average sales. And I used the same numbers in  
15 all of the examples. So, again, it was an  
16 example, relatively close to what we've  
17 experienced.

18 EXAMINATION

19 BY MR. HEDIN:

20           Q       So, Tom would that be 187 divided  
21 by whatever is the supply side?

22           A       No, I believe Perry, it's 170.

1           Q       Oh, 170 includes the market growth  
2 component?

3           A       Yes.

4           Q       Okay.

5           A       I believe those are the numbers.  
6 I can look in my spreadsheet, but I think  
7 that's what I used. I didn't put it in my  
8 notes, but I believe it was 170.

9           JUDGE CLIFTON: Do you have your  
10 spreadsheet here in the room?

11          THE WITNESS: It's in my computer.  
12 Yeah, I've got my laptop.

13          JUDGE CLIFTON: Oh, okay. But  
14 it's not booted up?

15          THE WITNESS: No.

16          JUDGE CLIFTON: So it would take a  
17 little while.

18          THE WITNESS: Take a minute, yeah.  
19 I'm very sure. I will check when I'm off and  
20 if it's different, I can let you know.

21          JUDGE CLIFTON: Why don't you do  
22 that.

1 THE WITNESS: Okay.

2 JUDGE CLIFTON: Because I do think  
3 we have to know what your --

4 THE WITNESS: Not a problem.

5 MR. HEDIN: Tom, if I'm not  
6 mistaken, I think it's 170 plus the market  
7 growth --

8 THE WITNESS: It could be, I think  
9 that, I know I used 170 --

10 JUDGE CLIFTON: You did great, I  
11 mean this is very complex. To me it's very  
12 complex.

13 THE WITNESS: I apologize for  
14 this, okay I used it, I used the --

15 MR. HEDIN: Your Honor, may I  
16 approach?

17 MR. FACER: I'm sorry, I thought I  
18 had a different -- I'm sorry.

19 JUDGE CLIFTON: Do you just need a  
20 little more time?

21 THE WITNESS: Yes, I do.

22 JUDGE CLIFTON: Okay.

1 THE WITNESS: Do you want somebody  
2 to go on, I can come back?

3 JUDGE CLIFTON: Yes, why don't you  
4 step down and we'll recall, Mr. Hedin?

5 MR. HEDIN: I was wondering if I  
6 can talk to Tom about the formulation. I  
7 think it may be incorrect --

8 JUDGE CLIFTON: Right, okay, well  
9 let's have him step down as a witness, and yes  
10 you are welcome to talk about it with him.

11 MR. HEDIN: Okay.

12 JUDGE CLIFTON: And then let's, in  
13 the meantime, we can either take a break so  
14 you can handle it right now, that's all right  
15 with me if that's the way you want to do it,  
16 or we can have you go back to that. They want  
17 to take a break right now. Let's stand at  
18 ease for about ten minutes, so please be back  
19 and ready to go at 11:15.

20 MR. HILL: We're okay with  
21 bringing on another witness.

22 JUDGE CLIFTON: I don't want Mr.

1 Hedin's attention to be diverted from the next  
2 witness. You know, that won't work, okay so  
3 we'll go again at 11:15.

4 (Off the record.)

5 JUDGE CLIFTON: All right, now  
6 we're back on record. Mr. Facer?

7 THE WITNESS: I'm sorry. The  
8 formulas I used in determining the regulation  
9 percentage, which is the amount of regulation,  
10 not the free tonnage, but the amount of  
11 regulation. I used a number of 160 for the  
12 amount of free tonnage, or the three year  
13 average sales, for the ten percent number,  
14 because our, one of our numbers that we've  
15 used recently was 140. So I just plugged in  
16 the number of 160 as being the number. So  
17 it's, so the formula, if you will, is one  
18 minus 160 divided by the national crop plus 50  
19 million, or the 200 or the 275 or the 350 to  
20 come up with that regulation percentage.

21 BY MR. HEDIN:

22 Q The 50 million is what Tom, is it

1 one, is it five plus 50?

2 A Yeah, the crop plus 50.

3 Q Right, but you had that posted as  
4 three, as the gross supply don't you? So,  
5 your first line item --

6 A No, I don't have gross supply, I  
7 have regulated crop plus carry over.

8 Q But your number 350 is the 300  
9 plus 50?

10 A 300 regulated crop plus 50,  
11 correct.

12 ADMINISTRATIVE LAW JUDGE CLIFTON:  
13 So, you start with three year average plus ten  
14 percent?

15 THE WITNESS: Right, the marketing  
16 order stipulates that we have to supply to the  
17 domestic market ten percent more than the  
18 prior three year average sales.

19 ADMINISTRATIVE LAW JUDGE CLIFTON:  
20 All right, and the reason you chose 160 is you  
21 started with the idea that we'll increase the  
22 140?

1                   THE WITNESS: Right, and again,  
2                   these were examples of, to be consistent. And  
3                   in the bottom, in the bottom example, the only  
4                   difference is the amount of work to  
5                   destruction. It isn't included in the crop  
6                   when calculating the percentage. So, I've  
7                   shown a ten and a 30, a zero, a ten and a 30,  
8                   so zero in the first, in the small crop, we  
9                   wouldn't put anything on the ground. And in  
10                  a little bit larger crop there may be ten  
11                  million that goes on the ground, and in the  
12                  larger crop 30 million that goes on the  
13                  ground. And that --

14                 JUDGE CLIFTON: All right and why  
15                 is 30 different from the 20 that was used --

16                 THE WITNESS: Because I, I made  
17                 the assumption that with the change in the  
18                 amendment, that it would, in a large crop we  
19                 would encourage a little bit more orchard  
20                 destruction.

21                 JUDGE CLIFTON: Okay, and why is  
22                 it that these comparisons work at the bottom,

1 in the section called options, to satisfy  
2 regulation, when you have changed the  
3 parameter at the top from say 20, what is  
4 that, 20 million?

5 THE WITNESS: Look at the middle.  
6 Maybe the best way to answer that is because  
7 I've got two variables working in the last  
8 column, go to the middle column.

9 JUDGE CLIFTON: Okay.

10 THE WITNESS: The 275 column?

11 JUDGE CLIFTON: Yes.

12 THE WITNESS: If you, if the  
13 regulation percentage is 42 percent, in the  
14 top example, see that, and the actions to  
15 satisfy the regulation, if grower certificates  
16 are used it takes five point three million  
17 pounds of grower certificates, at the top, and  
18 three point one million pounds of, or three  
19 point one million pounds of export  
20 certificates --

21 JUDGE CLIFTON: Okay.

22 THE WITNESS: -- to satisfy that

1 42 percent regulation. You go to the bottom  
2 and I used the same 10 million pounds of  
3 destruction. The amount needed increases from  
4 the three point one up above, if you just look  
5 at the export slide, it increases from three  
6 point one to three point three, that's the  
7 reflection that the regulation percentage went  
8 up a little bit. So there's a little bit more  
9 needed by that handler. But since they will  
10 be treated, since orchard certificates will be  
11 treated the same as export certificates, it  
12 only requires three point three grower  
13 certificates now. In the up above example it  
14 referred five point three. And I apologize,  
15 I did add another variable in that last  
16 column, I shouldn't have. The middle column,  
17 that's the same variable, there's no change in  
18 variables.

19 JUDGE CLIFTON: But the reason you  
20 did is because you're anticipating that would  
21 be more realistic?

22 THE WITNESS: Right, I was to

1       trying to, yeah, I was trying to show what I  
2       think might happen.

3                   JUDGE CLIFTON:   And you did  
4       explain that when you went through it the  
5       first time, I just wasn't quite --

6                   THE WITNESS:   I understand.

7                   JUDGE CLIFTON:  -- quite as able to  
8       grasp it when you said it then.  All right,  
9       what other questions do people have?  Mr.  
10      Hedin?

11                                   EXAMINATION

12      BY MR. HEDIN:

13                   Q       Tom, in your lower portion, the  
14      option is to satisfy regulation, we see that  
15      grower diversion certificates, export or new  
16      product credits are all the same?

17                   A       It would take the same amount,  
18      correct.

19                   Q       So it reflects the fact that  
20      bottom line credits are now just that, --

21                   A       Right.

22                   Q       -- and they're equivalent to --

1           A       Right.

2           Q       -- harvested.  Thanks.

3                               EXAMINATION

4       BY MR. HILL:

5           Q       Brian Hill, just one more  
6       question, if you had used in your amended  
7       structure the, if you had used 20 million for  
8       the in-orchard destruction --

9           A       The new percentage would be 57.

10          Q       Okay, go down, so that's --

11          A       It would be 57 instead of 58, I  
12       just did that exact.

13          Q       All right, thank you.  That's what  
14       I wanted to know.

15          A       I mean if you want I'll amend  
16       your, your, you want it right off to the side  
17       of the work sheet, if we used 20 million  
18       orchard destruction in the bottom section of  
19       the amendment, so that there's no change in  
20       variables, the new regulation percentage would  
21       be 57 instead of 58, so you'll notice a, you  
22       know, compared to the top a three percent

1 change. And the amount of grower diversion  
2 certificates, export certificates or new  
3 product certificates would be four point five.  
4 And the handler available to sell number would  
5 be four point three instead of four point two.  
6 The shortfall due to regulation is four point  
7 seven, and there's rounding numbers in that,  
8 in the rounding --

9 JUDGE CLIFTON: That's helpful.

10 THE WITNESS: I apologize for the  
11 --

12 JUDGE CLIFTON: No, but thank you  
13 both, that's helpful. It's very fine tweaking  
14 here, very fine. What other questions does  
15 anyone have for Mr. Facer? There are none,  
16 you may step down. Thank you.

17 MR. HILL: Your Honor, I'd like to  
18 move Exhibit 8 --

19 JUDGE CLIFTON: Is there any  
20 objection?

21 MS. DESKINS: No objection.

22 JUDGE CLIFTON: Exhibit 8 is

1 hereby admitted, and you may call your next  
2 witness.

3 (Whereupon Exhibit 8 was admitted  
4 into evidence.)

5 MR. HILL: Your Honor, I call Jim  
6 Nugent, please.

7 MR. NUGENT: Your Honor, I have  
8 two handouts.

9 JUDGE CLIFTON: And how many  
10 copies?

11 MR. NUGENT: Ten.

12 JUDGE CLIFTON: Okay, let's go off  
13 record.

14 (Off the record.)

15 JUDGE CLIFTON: All right, we're  
16 back on record at 11:29. Would you please  
17 state and spell your full name for us?

18 MR. NUGENT: James Nugent, J-a-m-  
19 e-s, N-u-g-e-n-t. But I go by Jim.

20 JUDGE CLIFTON: All right, and  
21 would you raise your right hand, I'll swear  
22 you in.

1 Whereupon,

2 JAMES NUGENT,

3 called as a witness herein, after having been  
4 first duly sworn, was examined and testified  
5 as follows:

6 JUDGE CLIFTON: Thank you. Mr.  
7 Hill?

8 EXAMINATION

9 BY MR. HILL:

10 Q Hello Mr. Nugent, how are you  
11 doing?

12 A Just fine.

13 Q Okay, so you have two documents  
14 that we -- and marked as Exhibits 9 and 10.  
15 You'll not give a prepared statement, but  
16 you're prepared to speak about the documents,  
17 correct?

18 A Well, let me give, I do have a  
19 little bit that I want to state before I get  
20 into them, if I could, please?

21 Q Sure.

22 A First of all, I'm a grower from

1       Suttons Bay, Michigan, which is up in the  
2       northwest Michigan area, near Traverse City.  
3       I'm a fairly small cherry grower, but I also  
4       serve as the grower, a grower representative  
5       from the northwest Michigan district on the  
6       CIAB, and I spent a career from 1976 through  
7       2007 with Michigan State University, where I  
8       worked as a District Horticulturalist for MSU  
9       Extension and, at least in the last half of  
10      my career. And I was also the coordinator of  
11      the Northwest Michigan Horticultural Research  
12      Station for the Michigan Agricultural  
13      Experiment Station. But in the first half of  
14      my career, I also spent that in northwest  
15      Michigan, so I, my whole career was working  
16      with the cherry industry in northwest  
17      Michigan.

18                I'm here to support the proposed  
19      amendment, because I believe it will benefit  
20      the growers, and I will try to present some  
21      information to support that, that conclusion.  
22      First of all, what we're talking about with

1 this amendment is the, what we're calling  
2 grower diversion, is in periods when we have  
3 no market, have no marketing order this is  
4 called crop abandonment. And it's not a new  
5 concept to the marketing order, period. We've  
6 historically abandoned fruit some years,  
7 sometimes because of natural causes, a storm  
8 or something. But typically, much larger  
9 abandonment in large crop years than small  
10 crop years. And so I did an analysis that I  
11 thought would help bring some perspective to  
12 the issue of crop analysis, and I looked at  
13 the years 1992 through '96, that was the five  
14 year period immediately before the Federal  
15 marketing order. And in the next five year  
16 period of '97 through 2001 was the first five  
17 years under the marketing order, and it's  
18 quite interesting, both of those were periods  
19 of very large crops on average. What I've  
20 presented in this analysis is the average  
21 production in millions of pounds, so from '92  
22 to '96 we produced on average 332 million

1 pound of cherries. Of that, 30, and these,  
2 this data all comes from USDA data, the crop  
3 abandonment was 38.6 million pounds, given a  
4 supply for processing estimated at roughly 289  
5 million pounds.

6 Those numbers don't subtract  
7 exactly like that, because within USDA figures  
8 they also put in fresh cherries that go to  
9 fresh market, and that really has nothing to  
10 do with the analysis, so this is just the USDA  
11 numbers. Our grower price average during that  
12 five year period was thirteen point two cents  
13 a pound, netting a farm gate value, according  
14 to the USDA, again, of 38.8 million pounds.  
15 None of those are calculated by any other,  
16 other than I just averaged the year, the year  
17 periods.

18 The first five years of the  
19 marketing order saw actually quite similar  
20 average crops, only slightly smaller at 311  
21 million pounds, are now what we would call in-  
22 orchard diversion, but if we want to look at

1       it as the USDA quantifies it as crop  
2       abandonment, was 24.5 million, actually less  
3       abandonment in the orchard, in the first five  
4       years of the marketing order. The net for  
5       processing was very, very similar, so I find  
6       that such an interesting time frame to  
7       compare, because the supply for processing at  
8       284.4 million was only 4.4 million pounds  
9       difference in those two time periods. The  
10      grower price, though, did go up quite  
11      significantly, growers would have like to have  
12      seen that go up more, and I can talk about  
13      that in a minute. But it increased by four  
14      point seven cents per pound, which was a  
15      pretty huge increase, given the fact that the  
16      parameters of production, and particularly  
17      supply for processing, were virtually  
18      identical. So, quite a significant percentage  
19      increase in grower returns as a result of the  
20      marketing order. And it wasn't because we put  
21      additional fruit on the ground, we actually  
22      put less, it's because of the other parts of

1 the marketing order that made for more orderly  
2 use of the diversion of the excess product.  
3 The farm gate value during that five year  
4 period was 50.9 million, again up  
5 significantly.

6 The next period is actually a six  
7 year period, well actually, the next year is  
8 2002, and I leave that out of date, I always  
9 do, because we had a record short crop. I  
10 mean, in this case I looked back at data as  
11 far as it goes in the USDA, which is 1927, at  
12 a time when we had a much, much smaller  
13 industry. But in 2002 we produced less  
14 cherries than we ever had going clear back to  
15 the 1927, as far back as data went. That crop  
16 really hurt our markets, and fortunately we  
17 had fairly large carry over, that's why when  
18 we talk about these diversion options we don't  
19 want a program that puts everything on the  
20 ground with no carry in, because then in a  
21 year with a short crop we would short the  
22 market.

1 Well in 2002 the crop was so  
2 unprecedentedly short, none of would ever  
3 plan for it, this was like a, like a 100 year  
4 event or, or more, in my opinion. And that's  
5 why it's not justifiable to use it in any  
6 statistical analysis. But it hurt our  
7 markets, and we have never recovered all of  
8 the lost markets we lost from that crop, and  
9 it's because we produce a processing commodity  
10 that, it's not like if you have a freeze out  
11 of oranges one year and you're selling them  
12 all at the fresh market, you can just be back  
13 on the market next year. In our case, if a  
14 manufacturer takes cherries out of their  
15 product line for their bagels or their pies or  
16 whatever, they may not put that cherry back  
17 in.

18 And so, if you look at that next  
19 period, '03 to '08, following the '02  
20 disaster, our crop production has actually  
21 been basically moderate. Very significant  
22 drops from the 311 million pounds, we now

1 average 240 million pounds. Abandonment still  
2 occurred, as Tom mentioned, but at a very,  
3 very low rate, three point five million. The  
4 supply available for processing down to about  
5 236 million pounds, about a 48 million pounds  
6 less supply for processing, roughly, and that  
7 indicates basically that, roughly 50 million  
8 pounds of market that we lost as a result of  
9 '02, in my opinion.

10 But, our crop size was not  
11 excessively large, the average grower price of  
12 29.2 cents a pound during that period, farm  
13 value you can see is up, even though crop size  
14 is down, but the price is up much more so the  
15 farm gate value is about 70 million. In '09  
16 I put that separate, because that is really  
17 the year that prompted this request for this  
18 amendment. We came in with our large crop  
19 again, and I would say that in looking back at  
20 data, I haven't lived the whole life of the  
21 cherry industry, but in the data there was  
22 never such a long period of time between,

1 basically full crops. We had a full crop in  
2 '01 and we didn't come back with our next full  
3 crop until '09. Usually if we look back in  
4 data those full crops are about every three  
5 years, '01, '98, '95, '92, '87, all really big  
6 crops. So, three, four, five year intervals.  
7 We went a long period without a full crop and  
8 in '09 we had a crop of 353 million, that was  
9 the sixth largest crop. Now in this case I  
10 did go back only to 1960 in data, because  
11 that's all I had ready access to, I'm a grower  
12 now and not an Extension Agent, and I didn't  
13 have, that's all the data I had. But it's  
14 unlikely that there was anything in the 50's  
15 or previous that would have changed that from  
16 the sixth largest all time, but certainly the  
17 sixth largest in the last 50 years.

18 Our abandonment was tenth highest,  
19 and what we actually processed according to  
20 USDA data, the supply for processing of 320  
21 million was actually our second largest in US  
22 history. I believe that would surprise even

1 the growers and processors in this room to  
2 realize that. And I believe that the reason  
3 for that was the disincentive that the  
4 processors see, or the handlers, in having  
5 growers put fruit on the ground when there's  
6 a very large diversion, which is what prompted  
7 this request for an amendment.

8 The average grower price in '09,  
9 at least preliminary numbers, are, USDA are,  
10 19.7 cents. That calculates, according to  
11 them, to a farm gate value of 64.2 million.  
12 The real impact is on 2010, when we came in  
13 with a crop that, about 200 million roughly,  
14 roughly 57 percent of '09's crop, but the  
15 grower, the price that growers will receive is  
16 not yet set by all processors, but it will  
17 likely be not much higher price than '09. And  
18 that really hurts cash flow if you're only  
19 producing 57 percent of a crop and the price  
20 per pound stays virtually constant.

21 And in the case of northwest  
22 Michigan, where I'm from, we on average

1 produce 50 percent of the nation's tart  
2 cherries in the northwest Michigan district,  
3 and this year's crop was less than half of an  
4 average, the last five year average, in the  
5 last five year average, and that's the average  
6 compared to just last year it was more like a  
7 third of a crop. So, cash flow is really  
8 tight, because there's very low returns, so I  
9 believe that the amendment will improve grower  
10 returns in three ways.

11 First of all, and probably the  
12 most important, it will help to reduce the  
13 very large carry over from a very large, from  
14 a large crop year. Get that down to a more  
15 manageable carry over so it's not so much of  
16 a burden around the industry to deal with.  
17 Secondly, as Tom already mentioned, there is  
18 value in grower diversions, and I believe that  
19 this amendment will place greater value in the  
20 grower diversions, so I believe that that is  
21 a second way that growers will benefit. And  
22 the third is that if the, when the fruit is

1 abandoned in the orchard, there are some cost  
2 savings associated with that abandonment. The  
3 variable cost of harvesting on a, with an  
4 average crop year is about six point seven  
5 cents a pound, but the, I don't see  
6 significant abandonment under grower diversion  
7 in average years, it's only going to be in the  
8 larger crop years. And in larger crop years  
9 the cost per pound of harvest decreases, but  
10 it's probably, depending on the crop size,  
11 generally in the five to six cents per pound  
12 range. So there's about that much of a cost  
13 savings if I, if as a grower I don't harvest  
14 the crop. Now that's including the variable  
15 cost of actually harvesting it, of cooling  
16 that fruit, of transporting it to the  
17 processor or, so.

18 I think in, to summarize, I think  
19 that the date would indicate that the Federal  
20 Marketing Order has been a benefit at, to the  
21 growers. You can see that by improved farm  
22 gate values. Now it's not comparable to look

1 at the shorter crop years compared to the  
2 larger crops, because as we get shorter crops  
3 we do get larger farm gates in general, but,  
4 certainly it has also improved our average  
5 prices. But the frustration on the part of  
6 the growers is that these  
7 prices are still not achieving our cost of  
8 productions, and from a long term  
9 sustainability perspective with the industry,  
10 we have to be able to achieve the, our cost of  
11 production. In the short term, we don't  
12 necessarily have to because part of our total  
13 cost of production is our fixed, our costs  
14 that are fixed. Not every grower has the same  
15 costs, there's a value for land calculated in  
16 and certainly if that land is all paid for  
17 that grower doesn't have that as out of cash  
18 expenses. There's a cost associated with  
19 growing the young orchard, of taking out the  
20 old orchard, replanting it, and bringing it up  
21 to bearing age. That's a period of, you have  
22 to get roughly up to about year five or six

1 before we have a bearing orchard.

2           So there's costs associated with  
3 that, and as a grower I can get by on the  
4 short term by not making the new plantings.  
5 But in the long term we have to be planting  
6 new orchards or the industry isn't  
7 sustainable, and we have to be able to  
8 transfer that land with orchards to the next  
9 generation, or we don't have a sustainable  
10 industry either. And so, it's for those  
11 reasons that I think that this amendment would  
12 be beneficial to the growers. So that's, I  
13 welcome any questions. I probably should  
14 mention that while I was in Extension I was  
15 co-author of the Cost of Production Studies,  
16 I think every one that's been done in the last  
17 35 years I co-authored, but that doesn't mean  
18 I'll remember all those figures off the top of  
19 my head. But the latest one was published in  
20 September of 2010, so if folks from the USDA  
21 want to review that, that is available as a  
22 Agricultural Report No. 639.

## EXAMINATION

1  
2 BY MR. HEDIN:

3 Q Could you specify that again?

4 A It's Agricultural Economics Report  
5 No. 639, it's titled Michigan Production Costs  
6 for Tart Cherries by Production Region.

7 Prior cost of productions, with the exception

8 of one done in the early '60's that I didn't

9 have anything to do with, have analyzed the

10 cost of production in northwest Michigan only.

11 This particular time we did a more in-depth

12 study looking at cost of production in

13 southwest Michigan, in west central Michigan

14 and in northwest Michigan. And in northwest

15 Michigan we broke the group into the, some

16 very, our largest growers and more of our mid-

17 sized grower groups. So we actually have data

18 compiled on both, and certainly it is more

19 efficient to grow cherries in the larger

20 operations than it is the mid-size to small

21 operations. But, interestingly, the cost by

22 regions don't vary all that greatly. The

1 biggest difference in cost per pound is the  
2 yield, and the yield does vary by region, so  
3 that influences the average cost of  
4 production.

5 But in, if we do a blended  
6 statewide average on cost of production, today  
7 according to our most recent calculation, our  
8 cost of production is 36 cents a pound, on a  
9 blended statewide basis on an average yield.

10 In northwest Michigan, because our yields are,  
11 average higher, the blended average was, or  
12 the cost of production for the mid-size  
13 growers was 32 cents, about. I was trying to  
14 remember back to '97 and what it was at that  
15 point and I, I'm just not sure, I believe it  
16 was in the 26 cents a pound. I think the  
17 reason that growers were so pleased at looking  
18 at 25, is you'll look at the data for the  
19 previous five years and the price was  
20 averaging 13.2 cents a pound. That was a very  
21 compelling reason to increase it, because that  
22 was way, way below the cost of production, and

1 frankly they lost a lot of growers during that  
2 period, because the cost, because the prices  
3 were so low. No, production was high, but  
4 still, those, even at the higher productions,  
5 we were not, we were not covering enough  
6 costs.

7 JUDGE CLIFTON: Mr. Hedin, do you  
8 have a question?

9 BY MR. HEDIN:

10 Q Yes, Jim, thank you very much.  
11 Jim, you speculated that you thought the price  
12 for this year will be comparable to '09. Is  
13 that because of the carry over factor?

14 A Yes, I think it will be up a  
15 little bit, the preliminary data is up just a  
16 small amount, but I, it is fundamentally  
17 because of the carry over, yes.

18 Q Also, you talked about the cost  
19 savings for, variable cost for harvesting. In  
20 your experience do growers also pay surcharges  
21 either from CMI or CIAB, and do they have  
22 those savings as well?

1           A        The, the way the growers are paid  
2           is that the, the check that comes to them has  
3           a deduction for a half a cent a pound that  
4           goes to the Michigan Cherry Committee for,  
5           ultimately to the Cherry Marketing Institute  
6           for Promotion and Research, and there's also  
7           a half cent a pound deduction for the cherry  
8           industry, the administrative board for the  
9           promotion part, the processors pay the  
10          operational costs of the CIAB, but the  
11          industry voted a few years ago to expand our  
12          national promotion from just some, some of the  
13          states contributing to that half cent a pound.  
14          So there is an additional half cent a pound,  
15          or an additional cent a pound savings for  
16          those to, compared to, calculated into that  
17          total cost of production is that, are those  
18          figures, and yet in my, looking at the  
19          variable harvest savings I did not include  
20          those. So it would add another cent a pound  
21          if you included those, because of course those  
22          wouldn't be paid on fruit that's dropped on

1 the ground.

2 Q And then finally, Jim, on that  
3 economic report, how might we be able to get  
4 that?

5 A It's, good question, the bulletin  
6 office at Michigan State University Extension  
7 I'm sure would have that. Otherwise, contact  
8 Dr. Nikki Rothwell. Nikki is one of the co-  
9 authors and is the current District  
10 Horticulturalist in northwest Michigan and  
11 coordinator of the Horticulture Research  
12 Station. She took the position I retired from  
13 and Nikki, Nikki sent this to me  
14 electronically, so in a pdf.

15 Q Could you please spell that name--

16 A Nikki, N-i-k-k-i, Rothwell, R-o-t-  
17 h-w-e-l-l. Her, I don't know, I better not.  
18 I think I know her email address but I better  
19 not give it to you because I might be wrong.  
20 I can give you the phone number at her  
21 research station. Her office number is 231-  
22 946-1510.

1 Q That's all, thank you Jim.

2 JUDGE CLIFTON: What other  
3 questions do people have of Mr. Nugent? Well,  
4 before we do that, Mr. Nugent are you also  
5 going to go into any detail on Exhibit 10?

6 THE WITNESS: No, Exhibit 10 I  
7 just provided because that's, that is  
8 basically where I got the raw data from, and  
9 it's USDA published data. The industry puts  
10 out a statistics report where one of our, a  
11 former member of the AgiCom, a grad student at  
12 AgiCom, is from a cherry growing family in  
13 Utah, and he compiles the data and the Cherry  
14 Marketing Institute publishes it. So, it came  
15 from that, and I just want to give that as  
16 supporting data in case USDA was interested in  
17 analyzing things in other way.

18 BY MR. HEDIN:

19 Q Jim, for those who don't know, can  
20 you tell us who the Cherry Marketing Institute  
21 is and what it's function is?

22 A The Cherry Marketing Institute is

1 our national cherry promotion organization.  
2 They spend most of their dollars on promotion,  
3 they do spend some dollars on research as  
4 well, particularly in the area of health  
5 benefits and there's, it's, so the programs  
6 that fund it are all, ultimately come out of  
7 the, from the growers, but they have voted  
8 some individual state programs, most of those  
9 where they have them or have sent upon, not  
10 every state has a program. But, and those  
11 dollars will go into the Cherry Marketing  
12 Institute, even if it's coming from New York  
13 or Wisconsin or Michigan. And the, then  
14 through the CIAB, this was not initially part  
15 of, it was always part of the Act, but we  
16 didn't implement it for several years, but a  
17 few years ago, in addition to the supply  
18 management the, everybody thought it was so  
19 critical for us to expand demand that we voted  
20 to have an additional half cent a pound  
21 assessment. And frankly, I think that is  
22 really the key to our success, ultimately this

1 industry can't regulate itself out of over  
2 production. What we really, fundamentally  
3 have to do is get the consumption back up, and  
4 it was, I mean it sounds like it was all  
5 because of '02. '02 was a watershed event  
6 with the lack of crop, but the industry is  
7 also changing very dramatically, and we've  
8 been an industry that has typically supplied  
9 product for the desert market, and we're  
10 transitioning from that to, the growth markets  
11 are in the juice and dried areas, and both,  
12 both really are moving away from the desert  
13 market.

14 So, the industry is going through  
15 a transition, there's no question about that.  
16 And ultimately we've got to be able to expand  
17 markets and that's what the Cherry Marketing  
18 Institute is all about. MR. HEDIN: May I  
19 continue?

20 JUDGE CLIFTON: You may, Mr.

21 Hedin.

22 BY MR. HEDIN:

1           Q       Jim, how do you think growers will  
2 respond if they have a chance to earn bottom  
3 line credits as compared to what they  
4 currently, they generate?

5           A       Well, I think we're going to see  
6 more in orchard diversion. I agree completely  
7 with Tom, because, well first of all I think  
8 the processors are going to encourage more.  
9 I'm hoping that the processors also bring some  
10 money to the table, to the growers that do  
11 that. But I think we're going to see more in-  
12 orchard diversion.

13                       But, let me qualify that, Perry.  
14 I think, when I think we'll have the  
15 differences in those really large crop year,  
16 and those are the problems, the crops like '09  
17 that are really large, I don't think it's  
18 going to make much difference in the moderate  
19 to short crop years, because everybody would  
20 really prefer to pack and sell as much as they  
21 can. And I think that the diversion options  
22 for new product, new market are really

1 critical and will continue to be critical.  
2 Because as we have been transitioning away  
3 from the traditional markets, that's really a  
4 key to success that the industry has  
5 implemented and it's been, I think, really  
6 vital. And there's a lot of support in the  
7 grower community for efforts on part of the  
8 industry to do what they've got to do to get  
9 the prices up.

10 Q Jim, some have said to me that  
11 they fear that this would cause growers to  
12 grow just for diversion. Is that a likely  
13 response from the grower community?

14 A I don't, I never figured out how  
15 the economics work out on that. There may be  
16 some people that try, but I don't think it'll  
17 last long, because unless there's a lot more  
18 value here than I think that's, not a very,  
19 not a sustainable economic model as I look at  
20 it.

21 MR. HEDIN: That's all your Honor,  
22 thank you.

1                   JUDGE CLIFTON: Do you want to be  
2 a little more specific, how many pennies do  
3 they take in and how many did it cost to get  
4 those? Do you have kind of a ballpark --

5                   THE WITNESS: You mean on the, on  
6 the diversion certificates?

7                   JUDGE CLIFTON: -- if that's what  
8 you were going to use your crop to do?

9                   THE WITNESS: Yeah, well first of  
10 all, I think the biggest economic value of  
11 this is to get rid of those really large  
12 supplies that carry into the short crop year.  
13 I think that is really the biggest, but in  
14 terms of actually the value of diversion  
15 certificates it does vary right now. Tom  
16 mentioned his example of a processor that paid  
17 five cents a pound for growers that put them  
18 on the ground. Some processors have paid  
19 growers for what they put on the ground, I  
20 mean what they're really doing is sort of  
21 taking money from those that didn't put it on  
22 the ground to help level things out. We

1 haven't seen many growers that have just said,  
2 I'm going to put excess product on the ground  
3 rather than delivering it. I have known that  
4 to occur, and grower diversion credits have  
5 brought generally in the neighborhood of maybe  
6 ten cents a pound, if they have excess  
7 diversion credits for sale historically, I  
8 expect that price to go up with this, but it  
9 does vary a lot by year. And how much it will  
10 go up I don't really know, but I do think it  
11 will go up if they choose to do that, and if  
12 the price is going to be quite low there's  
13 incentive to do that, because the cost  
14 savings, the variable cost savings of in-  
15 harvest and shipping.

16 So, I do think it's going to be a  
17 real incentive, and I do think that it will  
18 ultimately drop more money into the industries  
19 pockets, both in the year it occurs and then  
20 in the subsequent years. But this is one of  
21 those situations where we don't want to divert  
22 all of our fruit on the ground, because we

1 want some of it for new products, and we want  
2 some of it for export, so it's just one tool  
3 that I think will get better use, and I think  
4 '09 really pointed out that example that Tom  
5 was trying to get at in the data from the  
6 industry of what it did in terms of the  
7 processors saying, you know, instead of  
8 putting this on the ground, even though we're  
9 picking out long, let's bring this in and  
10 process it. And our markets just didn't  
11 justify processing 320 millions pounds, but  
12 that's what our processors did.

13 Q Thank you very much.

14 JUDGE CLIFTON: Ms. Salehi?

15 EXAMINATION

16 BY MS. SALEHI:

17 Q For now I have two questions for  
18 Mr. Nugent. Mr. Hedin asked you a question  
19 and in there he referred to bottom line  
20 credits. What do you understand that to mean?

21 A That's a term that we used within  
22 the CIAB and as explaining this concept of how

1 we're going to, if this amendment passes, this  
2 new way of calculating the credits. And the  
3 terminology wasn't developed by me, I think it  
4 came from processors, and the reason they  
5 think of them that way is that once they have  
6 their pack put up, if they export product or  
7 sell it to, into a qualifying new market, they  
8 get a credit, a diversion certificate for each  
9 pound, you know, they sell it, the pound  
10 export, to get the diversion credit for a  
11 pound. If they ask the growers to put fruit  
12 on the ground, and so what they really want  
13 from the grower is, you know, 75 percent of  
14 their crop and put the other 25 percent on the  
15 ground, well with each of one of those  
16 diversion certificates that grower brings in  
17 it takes their, okay if they process 10  
18 million pounds by each grower bringing in 75  
19 percent, now they bring in this extra 25  
20 percent instead of, instead of their handle,  
21 it's called, the fruit they handled is now, my  
22 math might be wrong, but roughly twelve point

1 five million instead of the ten million they  
2 actually pitted.

3 And so to a processor they see  
4 that as not the same way that this credit down  
5 here was, and so that's why they came up with  
6 the term bottom line, because this, these  
7 other credits drop, kind of the bottom line  
8 one for one. And the grower diversion credit  
9 changes their amount of handle, and when those  
10 were small figures, if the diversion  
11 percentage is relatively small this isn't such  
12 a big issue. That's why I don't think it'll  
13 affect very much how much gets put on the  
14 ground in shorter and moderate crop years.

15 But, in the large crop year, when  
16 the diversion percentage gets very high and  
17 it's very high when we are selling, you know,  
18 50 million pounds less than we used and yet we  
19 hit a crop that's, you know, among our biggest  
20 ever, we end up with this very large  
21 percentage so that amount of diversion credits  
22 they have to bring up on top really don't fall

1 to the bottom line for them. And so that's  
2 where the term bottom line came with. It may  
3 not be the best term, but it's kind of what  
4 this whole concept has become to be known as  
5 in the industry.

6 Q Okay, thank you. My second  
7 question is, I understood you to say that if  
8 this amendment is passed it will help the  
9 growers in three different ways. One is by  
10 helping them reduce the carryover.

11 A Correct.

12 Q The second is by having a greater  
13 value in the grower diversion certificates,  
14 and the third is the cost savings that are  
15 associated with abandonment. I think I  
16 understand the second and the third fairly  
17 well, would you please expand on the first,  
18 which was the reducing the carry over and I  
19 assume that's in the --

20 A Yes, that's a great question, I'm  
21 glad you asked that. I'll just use the  
22 example of the '09 and '10 situation, because

1 in this past year, in '10, the crop was quite  
2 small, 200 million would place it down, you  
3 could look at the date any place and it would  
4 be among the relatively smaller crops.  
5 Normally in that kind of a small crop year  
6 that price, the price goes up quite  
7 significantly, but the price is really a  
8 function of a combination of the new crop and  
9 the carry in. Now in the case of carry in  
10 within the CIAB, one of the reasons that the  
11 prices in the first five years in this  
12 analysis, that where the crops were very  
13 similar to the five years preceding, the  
14 difference is that a lot of that carry in is  
15 in our reserve pools, in the primary reserves,  
16 secondary reserve, wherever. But it's in the  
17 reserve pool so it's not available to market,  
18 but the market kind of knows it there. So the  
19 effect on price isn't, isn't like it was in  
20 the free market, when we have a big carry in  
21 in our reserve it, it's not as bad as having  
22 a big, if all that carry in was in free market

1 then the price would have, would be even  
2 worse. But it's not as good as not having all  
3 that carry in, because there is still carry  
4 in, so it has a depressing effect on the  
5 market. And in a year like 2010 with the size  
6 of our crop, if we would have had just an  
7 average carry in coming in, I believe that the  
8 price of the finished products would have gone  
9 up significantly and certainly the grower  
10 prices would have gone up very significantly.  
11 How much, you know, I haven't done that  
12 analysis, but that's what I mean is that  
13 there's a depressing effect when we have a  
14 very large, the carry in influences the next  
15 year's crop price. And to the extent that  
16 that carry-in is in reserve pool it's not as  
17 much of an effect, but there's still some and  
18 in a year like '09 when the production is so  
19 much above what we can actually market, we  
20 would have seen prices significantly higher  
21 this year if we would have put more on the  
22 ground last year.

1 Q Thank you.

2 JUDGE CLIFTON: Who else would  
3 like to ask Mr. Nugent something? Mr.  
4 Engeler?

5 EXAMINATION

6 BY MR. ENGELER:

7 Q Yes, Mr. Nugent you mentioned that  
8 if the grower in a large crop year put  
9 cherries on the ground or diverted, that he  
10 would not incur harvest costs. Could you  
11 mention a couple other costs there that they  
12 would be able to avoid, I think it was cooling  
13 and transportation. Do you have a, like an  
14 estimate on what cost for those functions are?

15 A Yeah, I actually included those  
16 but the, yeah I do. They, the variable  
17 harvest costs, at our average yield, is about  
18 four point five cents, but I don't expect this  
19 to occur on average yields, it's going to be  
20 on the larger crops. And here I have to do  
21 some adjusting from what's in the book because  
22 our harvest costs, if we are harvesting a lot

1 of cherries per pound it is cheaper per pound  
2 to harvest a large crop than does a small  
3 crop, because we shake less trees to fill the  
4 tank. But we do have more tank handling, so  
5 on a per acre basis the cost does go up some,  
6 so I just can't take per acre cost and divide  
7 straight.

8 I increase the cost per acre,  
9 which is the way that they, we basically  
10 calculate it. I took that per acre cost of  
11 roughly \$340 per acre, variable cost of  
12 harvest, for an average crop. If the crop was  
13 really small the per acre cost would go down,  
14 really large it goes up, so I increased that  
15 10 percent and then if I divided that 10  
16 percent by, say 12,000 pound yield instead of  
17 a 7,500 pound more average yield, that got me  
18 to a cost of about three point one cents for  
19 that variable cost of the shaking. And then  
20 the cooling and shipping costs are pretty much  
21 just a function of how many cherries you  
22 handle. It doesn't matter if it's a big crop

1 or a small crop, it's pretty much fixed rate,  
2 and our combination of those two according to  
3 our cost of production study is two point two  
4 cents a pound, so a large crop, small crop, it  
5 wouldn't matter.

## EXAMINATION

BY MR. HEDIN:

8 Q Jim, can you explain what you mean  
9 by cooling?

10 A Cherries are harvested into water,  
11 they're mechanically harvested, first of all,  
12 rather than hand picked. And when they float  
13 off our mechanical harvesters they're conveyed  
14 into tanks of water that hold roughly 1,000 to  
15 1,100 pounds of cherries. The cherries sink  
16 in the water but the water makes, adds in a  
17 buoyancy that it can handle them in big tanks.  
18 But if we were doing this dry, when we used to  
19 pick cherries by hand, when I was young, we  
20 picked in a lug where the depth of the cherry  
21 was only a few inches, because this is a very  
22 fragile, soft fruit. And if we stacked them

1 very deep, like in a bushel basket, they would  
2 just be smashed in the bottom. So our lugs  
3 were quite shallow.

4           When we mechanized the harvest we  
5 went to this water handling, so we put them in  
6 water and then we need to cool the, and bring  
7 the field heat out of the cherries, because  
8 when they go through the pitters the colder  
9 the cherry the better they pit. And getting  
10 pits out is probably our issue number one in  
11 this industry. It's, I wish we could get 100  
12 percent out, but the colder we get that fruit,  
13 the higher the percentage of pits that we get  
14 extracted. So, the growers bring those tanks  
15 of the water onto an area where they flush  
16 water through them to bring that field heat  
17 down as to, you know, more of an equilibration  
18 with our, with our ground water temperatures.

19                           EXAMINATION

20           BY MR. ENGELER:

21           Q           Okay, just one other thing. Now  
22 as a grower I was wondering what, if you could

1 summarize what factors you would, you would  
2 consider in a large crop year whether to  
3 divert or not divert? I think what -- if you  
4 could just kind of summarize?

5 A Yep, yep, no that's a very good  
6 question. Number one factor, as a grower I'm  
7 going to talk to my processor and see what  
8 their plans are, because not all processors  
9 are in the situation as Tom, I mentioned some  
10 processors have more, do more exporting that  
11 others, have more new product, new market  
12 credits than others. So they have to look,  
13 and I have to work with my processors,  
14 processor or multiple processors, not, many  
15 growers deliver, some growers deliver to more  
16 than one processor, and some growers deliver  
17 to just one. So they're going to, that's  
18 going to be the number one step, and the  
19 processors will give every grower a clue of  
20 kind of what's their plan for this, this crop.

21 And then as a grower, I can either  
22 follow just what that processor wants, or I

1 always have the option of diverting more in  
2 the orchard if I choose to. I have known that  
3 to occur, and actually in 1998 was a very  
4 large crop and we had a very low price, and  
5 one grower that diverted the whole crop  
6 probably made as much money or more, net, at  
7 the end of the year of anybody that harvested  
8 or just about anybody. I mean, so there is a  
9 time for it, but that's kind of the, that  
10 would be very exceptional. For the most part,  
11 most growers aren't going to divert excess.

12           Though, another really important  
13 factor that has come into it is what's my  
14 quality, because I'm talking about this, and  
15 yet if we have a windstorm come through the  
16 Suttons Bay area, I may need, it may be  
17 desirable for me to put more of my product on  
18 the ground and let my processor get somebody  
19 else to divert less somewhere else where the  
20 quality is better. So, and we do have a  
21 couple of major factors that effect quality.  
22 Wind is, wind is certainly one, it's such a

1 fragile fruit, and the other one is the fruit  
2 late in the season will sometimes get soft and  
3 if my processor puts up a lot of juice we can  
4 take that product, either wind whipped or  
5 juice and, or soft and divert into juice, but  
6 if I don't my processor doesn't have those  
7 options, I might decide I'm going to put more  
8 product on the ground, or my processor might  
9 encourage me to put more product on the ground  
10 and then do some kind of a, a sharing, so that  
11 the grower that got to take in everything,  
12 we'd both get, you know, we'd both kind of  
13 share in that. So a lot of it is driven by  
14 the, in the order we call handlers, but in the  
15 industry we call them processors.

16 Q Would the relative value of the  
17 diversion certificate be a impact your  
18 decision at all

19 A Yes, it would. Yeah, I would  
20 definitely be more apt to put fruit on the  
21 ground under this proposal.

22 Q Thanks.

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JUDGE CLIFTON: Mr. Johnson?

EXAMINATION

BY MR. JOHNSON:

Q Hi Jim, and thanks for that historical cost --

A I hope it wasn't too much, Ken.

Q Jim, just a couple quick questions. One, as a grower, do you see any potential downside if this proposal is --

A Yes, there's always trade offs in anything I can think of. This one has them as well. As we've already talked about, the diversion percentage actually goes up. The more fruit we put on the ground, the larger the diversion percentage is going to go up. If we picked out exactly an estimate because of the way it's calculated, because you're changing the divisor. So if, if I'm a grower that delivers to a processor that has a lot of exports, for example, and I don't, they could handle the diversion without putting anything

1 on the ground, my processors and therefore my  
2 fruit, more of it's going to end up in the  
3 diversion than it would otherwise. So there  
4 is a trade off, there's no question. That's,  
5 I can't really think though of another trade  
6 off, if there is one I'm not thinking of it  
7 right now, but that's the flip side. In my  
8 analysis I think overall that growers are  
9 going to benefit though more with this than  
10 without it. But it will vary somewhat  
11 depending on who my fruit goes to.

12 Q Okay, I will withdraw my second  
13 question that I had for you.

14 A Thanks.

15 JUDGE CLIFTON: Ms. Deskins?

16 EXAMINATION

17 BY MS. DESKINS:

18 Q I wanted to ask you, Mr. Nugent, I  
19 just had couple questions about Exhibit 9 and  
20 10. Exhibit 9, you said that you got all the  
21 information from USDA data?

22 A Yes.

1           Q       Okay, and then is that the, and  
2           then you also testified you used Exhibit 10  
3           made with the 9?

4           A       Yeah, yes, the data came from,  
5           from those, with the exception of my ranking,  
6           down on the, right were I ranked the '09 crop,  
7           it's there I actually went back further in  
8           time, and I didn't copy the reference  
9           material, but it all came from the same data  
10          source, only going back further in time.

11          Q       I looked through Exhibit 10 and  
12          who's the, some of your sources also are the  
13          CIAB?

14          A       To the, in that data I believe  
15          that's all what USDA publishes. Perry, you  
16          might have to help me on this one. I believe  
17          that's all USDA published data, but to the  
18          extent that they get information from USDA or  
19          from CIAB, it might influence that. Help me  
20          out on that one.

21                   MR. HEDIN: Yes, the first page is  
22          in fact sourced from, some from us, some from

1 the USDA. The capture date each and every  
2 year on production by district, so some of  
3 that would come from year, or the CIAB. Page  
4 two --

5 THE WITNESS: But do the totals  
6 create the district? He's correct, the USDA  
7 no longer gives us a break down of production  
8 or estimates by district in Michigan. They  
9 did for decades, but they quit doing that when  
10 we quit, when they quit doing an objective  
11 yield survey. They used to, we actually used  
12 to have them come out and count cherries for  
13 a more accurate, for an accurate pre-harvest  
14 estimate. When the industry decided to no  
15 longer fund that USDA quit doing it. They now  
16 present just statewide date. So, but that, I  
17 never used any of this analysis. I was always  
18 using US totals, so it wouldn't have come into  
19 play.

20 MR. HEDIN: And then the third page  
21 is indeed citing USDA non-citrus fruit --  
22 which is the production by year.

1 MS. DESKINS: Because on page two  
2 of Exhibit 10 you also refer to the food  
3 institute report of CHERRCO, did you get any  
4 information from them to prepare Exhibit 9 and  
5 10?

6 MR. HEDIN: The pricing component,  
7 Sharlene, is from the food institute reports.  
8 The only entity we know of who generates price  
9 for products, so that's what they've cited  
10 there.

11 THE WITNESS: But I believe that  
12 the grower price then is actually based on  
13 USDA surveys, which I cited. I didn't use  
14 that particular set of data. I have used it  
15 for other purposes, and the farm gate value  
16 was also, I believe, USDA data, it's not  
17 dependent on that source. USDA does surveys  
18 each year of what the growers end up  
19 receiving. So I believe the data I cited was  
20 all USDA but I could be wrong.

21 BY MS. DESKINS:

22 Q And I had a question for you also,

1 on page two of your table you have a column  
2 that's headed movement --

3 A I actually didn't bring a copy of  
4 that one up here, so if I could get that, if  
5 you wouldn't mind.

6 MR. HEDIN: If I may note, as we  
7 had said --

8 JUDGE CLIFTON: Mr. Hedin, I think  
9 I should put you under oath, because you're  
10 giving us some information here that will be  
11 evidence if you're under oath.

12 MR. HEDIN: -- the last question.

13 JUDGE CLIFTON: Would you raise  
14 your right hand, please?

15 Whereupon,

16 PERRY M. HEDIN,  
17 called as a witness herein, after having been  
18 first duly sworn, was examined and testified  
19 as follows:

20 WITNESS HEDIN: I just wanted to  
21 mention, and Jim said this in his testimony,  
22 this was prepared by a fellow who was a

1 graduate student at MSU before, and he does  
2 this in conjunction with the Cherry Marketing  
3 Institute. So, I'm not sure that Jim is the  
4 person who can attest to some of that data,  
5 and he's just, and he's taking it from the CMI  
6 stats book which is published annually by the  
7 Cherry Marketing Institute and has been done  
8 so for probably 20 years.

9 WITNESS NUGENT: Yes, and what I  
10 used off, from that particular page, was the  
11 grower price average which according to the  
12 footnote is from the USDA non-citrus fruits  
13 and nuts. The movement data, I better not  
14 speak to it because I'm not 100 percent sure  
15 where movement comes from. I didn't, I didn't  
16 utilize that in my, when I looked at supplies  
17 for processing I did not use that movement  
18 figure. Movement is very relevant to the  
19 industry, but it includes what's sold, whether  
20 it was carried in or new product, and I, so I  
21 didn't use that.

22 EXAMINATION

1 BY MS. ENGELER:

2 Q And then, you mentioned a report  
3 earlier, the Agriculture Economics Report?

4 A Yes.

5 Q Do you recall that, number 639?

6 A Yes.

7 Q Would you like us to take official  
8 notice of it?

9 A If, you might want to, yeah that  
10 might be a, might be a good idea, might be a  
11 good reference for you. So if you would like  
12 I can leave this copy with you, it would be  
13 fine.

14 Q If it's your only copy, if we  
15 could take official notice of it you don't  
16 need to --

17 JUDGE CLIFTON: Actually, I'd  
18 like, if we can, anything we take official  
19 notice of, I'd like to have a hard copy for  
20 the record. It's not legally required it's  
21 just practically very helpful, so if you  
22 wouldn't mind our taking it from you that

1 would be --

2 WITNESS NUGENT: Not a bit. I  
3 don't think I've scribbled this copy up at  
4 all, so --

5 JUDGE CLIFTON: All right, now  
6 because we're taking official notice of it, it  
7 doesn't get an exhibit number, but Ms. Salehi  
8 I'd like you to keep it with the materials  
9 that you're gathering.

10 MS. SALEHI: Yes.

11 JUDGE CLIFTON: And you may  
12 approach the witness. And Ms. Salehi, would  
13 you read into the record what it is and I will  
14 take official notice of it.

15 MS. SALEHI: Sure. The title of  
16 this document is Agricultural Economics  
17 Report, report number 639, dated September  
18 2010. The title is Michigan Production Costs  
19 for the Tart Cherries by Production Region.  
20 It is authored by Roy Black, James Nugent,  
21 Nikki Rothwell, Suzanne Thornsbury and Nicole  
22 Olynk. I hope I did not mess up anybody's

1 name. Would you like me to spell those names?  
2 Roy Black, R-o-y last name B-l-a-c-k. James  
3 Nugent, J-a-m-e-s last name N-u-g-e-n-t.  
4 Nikki Rothwell, N-i-k-k-i last name R-o-t-h-w-  
5 e-l-l. Suzanne Thornsbury, S-u-z-a-n-n-e last  
6 name T-h-o-r-n-s-b-u-r-y. And Nicole Olynk,  
7 N-i-c-o-l-e last name O-l-y-n-k.

8 JUDGE CLIFTON: I hereby take  
9 official notice of that publication, and I  
10 would like those publications that we have  
11 official notice taken of to be included in  
12 what is filed with the hearing clerk, and  
13 hopefully posted on the website for others to  
14 see if they want.

15 EXAMINATION

16 BY MS. DESKINS:

17 Q Mr. Nugent, you also testified the  
18 use of porpoise amendment, and I assume you're  
19 referring to the amendment to 930.59, the  
20 grower diversion?

21 A Correct.

22 Q Do you, did you have an opinion on

1 the other two amendments that were issued this  
2 morning?

3 A The, basically all of those  
4 changes in the marketing order are all part of  
5 this same amendment issue. So I think it's,  
6 yeah I was really speaking generically of all  
7 three of the specific changes that need to  
8 occur for us to be able to amend the order to  
9 make it work in this new way.

10 Q Thank you. I have no further  
11 questions.

12 JUDGE CLIFTON: Mr. McFetridge?

13 EXAMINATION

14 BY MR. MCFETRIDGE:

15 Q Hello Mr. Nugent, this is Marc  
16 McFetridge, USDA. I just have a couple of  
17 quick questions for you. I know you stated  
18 earlier that you were a small grower, and I  
19 just wanted to get it on record, so based on  
20 the Small Business Administration, their  
21 definition of a small grower is having annual  
22 receipts of less than \$750,000?

1           A       Yes, yes.

2           Q       All right.

3           A       Unfortunately.

4           Q       And then based on the Small  
5 Business Administration definition of a small  
6 grower, do you see these proposed amendments  
7 having any adverse impact on small businesses?

8           A       No I do not.

9           Q       Thank you very much.

10           JUDGE CLIFTON: Who else has  
11 questions for Mr. Nugent? Mr. Nugent, is  
12 there anything else that you can think of that  
13 you'd like to add at this point?

14           WITNESS NUGENT: I don't believe  
15 so.

16           JUDGE CLIFTON: All right, thank  
17 you. You may step down. And Mr. Hill, would  
18 you like to call your next witness?

19           MR. HILL: One second.

20           JUDGE CLIFTON: All right.

21           MR. HILL: Richard DeRuiter we're  
22 going to call now.

1 JUDGE CLIFTON: All right, now Mr.  
2 Hill, if you will approach me I will give you  
3 the copies that have been made. I don't know  
4 which witnesses would speak to these. Now,  
5 you'll recall this little number is the number  
6 for how many copies needed to be made, so we  
7 will need numbers for the exhibits themselves.

8 MR. HILL: Okay, sure.

9 MR. DERUITER: I'm going to need  
10 my copy, too.

11 JUDGE CLIFTON: And let me give  
12 you this as well, even though this is for the  
13 next person. This is number, ten copies were  
14 made of that. I need a copy I didn't keep one  
15 and the Court Reporter, thanks. What's being  
16 handed out now is on the letterhead of, I'm  
17 going to try to pronounce this name correctly,  
18 DeRuiter Farms, Inc.?

19 MR. DERUITER: Yes.

20 JUDGE CLIFTON: And I'm going to  
21 mark this as Exhibit 11.

22 MS. SALEHI: I'm sorry your Honor,

1 would you please repeat that?

2 JUDGE CLIFTON: Exhibit 11,  
3 DeRuiter Farms, Inc. I think I probably said  
4 it better the first time. It's a two page  
5 document.

6 MR. HILL: And your Honor, we're  
7 going to move for admission of Exhibits 9 and  
8 10.

9 JUDGE CLIFTON: Is there any  
10 objection to the admission of Exhibit 9?

11 MS. DESKINS: No objection.

12 JUDGE CLIFTON: Exhibit 9 is  
13 admitted into evidence. Is there any  
14 objection to the admission of Exhibit 10?

15 (Whereupon Exhibit No. 9 was  
16 admitted into evidence.)

17 MS. DESKINS: No objection.

18 JUDGE CLIFTON: Exhibit 10 is  
19 admitted into evidence. All right, how many  
20 people did not receive a copy of Exhibit 11,  
21 the DeRuiter letterhead exhibit? That's good  
22 news. All right, would you please state and

1 spell your name for me?

2 (Whereupon Exhibit No. 10 was  
3 admitted into evidence.)

4 MR. DERUITER: Richard DeRuiter,  
5 R-i-c-h-a-r-d, D-e-R-u-i-t-e-r.

6 JUDGE CLIFTON: And so it's  
7 pronounced DeRuiter, just like rider of a  
8 document?

9 MR. DERUITER: Yes.

10 JUDGE CLIFTON: All right, good.  
11 I'll have you remain seated while I swear you  
12 in. Please raise your right hand.

13 Whereupon,

14 RICHARD DERUITER,  
15 called as a witness herein, after having been  
16 first duly sworn, was examined and testified  
17 as follows:

18 JUDGE CLIFTON: Thank you. Mr.  
19 Hill?

20 EXAMINATION

21 BY MR. HILL:

22 Q Hello Mr. DeRuiter, how are you

1 doing?

2 A Good.

3 Q Exhibit 11 has just been marked as  
4 your personal statement?

5 A Mm-hmm.

6 Q And --

7 A Okay, thank you. I'm Rich  
8 DeRuiter, President of DeRuiter Farms  
9 Incorporated, which is located in Hart,  
10 Michigan, and in district two of the Federal  
11 marketing order. DeRuiter Farms Incorporated  
12 is considered a large producer and a small  
13 handler, by definition of the USDA. I have  
14 served as a board member or an alternate for  
15 the board since 1997, and I'm currently on the  
16 board serving as Secretary. I am here to  
17 testify in favor of the proposed amendments,  
18 I want to make that plural, to make in orchard  
19 diversion credits a bottom line credit.

20 Currently the way the optimal  
21 supply formula works, the higher the  
22 restricted percentage gets the less incentive

1       there is for handlers to accept the credits.  
2       Therefore, when there is a large crop, as in  
3       2009, coupled with a large restricted  
4       percentage, excess cherries were packed rather  
5       than diverted on the ground. The proposed  
6       amendment would put diverted fruit at the same  
7       value as other credits that the order allows.  
8       One pound of credits on the ground equals one  
9       pound of bottom line credit.

10                   DeRuiter Farms Incorporated has  
11       participated in every form of dealing with  
12       restricted fruit through the years. We have  
13       had export credits, new product credits, new  
14       market credits, and had diverted product at  
15       our plant and in our orchards. We have only  
16       diverted fruit in the orchard because of  
17       economic reasons, either the age of the tree  
18       was too young to put a mechanical harvester on  
19       them, or the crop size in that particular  
20       block was below the threshold of harvesting  
21       it.

22                   With the proposed change to the

1 bottom line credit, we would be more likely to  
2 divert fruit rather than speculate on fruit  
3 that has little or no chance of selling in the  
4 future. I believe the proposed amendment is  
5 grower friendly, because excess cherries that  
6 can't be sold in the export, new product and  
7 market expansion areas won't have to sit in a  
8 storage accumulating storage bills and  
9 lowering grower returns. And I would like to  
10 thank the USDA for tracking this, fast  
11 tracking this hearing, and I hope that they  
12 would expedite the rest of the process so this  
13 amendment can be in place by the 2012 season.  
14 Thank you.

15 JUDGE CLIFTON: Let's begin with  
16 Mr. Hill's table. Are there questions for Mr.  
17 DeRuitter?

18 EXAMINATION

19 BY MR. HEDIN:

20 Q Rich, in the past you've heard a  
21 couple now testify about the volume of in-  
22 orchard diversion activity. What's been your

1 history at DeRuiter Farms of in-orchard  
2 diversion activity?

3 A Like my statement said, it's been  
4 limited to either young trees or block that  
5 have had low crops on them and we take a  
6 chance on diverting them rather than incurring  
7 the harvesting cost.

8 Q Do you think that you as a  
9 producer and you as a handler will see more of  
10 that activity as a consequence of this?

11 A I believe if the amendment passes  
12 I think there will be more incentive for  
13 growers and handlers to participate in in-  
14 orchard diversion credits.

15 Q And as both Mr. Facer and Mr.  
16 Nugent said, are you of the opinion that it  
17 will increase the returns to growers?

18 A Yes, as I stated it's going to  
19 reduce storage costs and to the grower, as  
20 other people have stated, harvesting costs and  
21 trucking cooling expenses at the grower level.

22 But at the handler level, too, it reduces

1 some costs of storage and of not selling the  
2 product for a period of time.

3 Q You mentioned that you had used  
4 all of the alternatives for in-orchard, or for  
5 excuse me, compliance. Which do you find the  
6 most beneficial and will this amendment equate  
7 the grower diversion price to the other  
8 alternatives?

9 A Well, we're a grower processor,  
10 and on the processor side I think it's better  
11 for us to try to sell fruit if we can make  
12 money doing it, if we can meet the restriction  
13 by doing so, but at a grower level if you  
14 can't make profit at it, it's better to walk  
15 away from it and divert it, so it's strictly  
16 an economic threshold how we make our  
17 decision.

18 Q Thank you, Rich.

19 JUDGE CLIFTON: Ms. Salehi?

20 EXAMINATION

21 BY MS. SALEHI:

22 Q I just have one question for you

1 from your written testimony here. You have  
2 referred to the accumulated storage bill, and  
3 I just wanted to know if that was a huge  
4 percentage of the bill as far as costs are  
5 concerned?

6 A On our five plus one product,  
7 that's a certain product that we put up, the  
8 storage bill is somewhere between three  
9 quarters and a cent a pound a month to keep it  
10 in storage. So that's the accumulating bill  
11 that occurs on that product.

12 Q Thank you.

13 JUDGE CLIFTON: Per month, for how  
14 much volume?

15 THE WITNESS: Per pound.

16 JUDGE CLIFTON: Per pound. What  
17 other questions are there for Mr. DeRuiter?

18 EXAMINATION

19 BY MR. ENGELER:

20 Q In your testimony you refer to  
21 being a member of the board and I assume, just  
22 for clarification purposes, you mean the

1 Cherry Industry Administrative Board, is that  
2 correct?

3 A Yes.

4 Q Okay, thank you. And you also  
5 indicated that you are a grower and also a  
6 handler, that DeRuiter Farms is a grower and  
7 handler, and I was wondering if your handler  
8 entity also receives cherries from any growers  
9 besides DeRuiter Farms?

10 A Yes, we do.

11 Q Okay, and the last witness  
12 testified that one of the decisions, one of  
13 the factors he would consider in diverting  
14 cherries would be he would first work with his  
15 processors and check with them. Would you,  
16 speaking from the processor, handler side,  
17 would you work with, tell your outside growers  
18 to do the same?

19 A Yes.

20 Q Okay, that's all I have.

21 JUDGE CLIFTON: Who else? Mr.  
22 Johnson.

EXAMINATION

1  
2 BY MR. JOHNSON:

3 Q Hi Rich, just for clarification or  
4 to further explain, as a grower if you divert  
5 cherries you would, while there is no  
6 guarantee, but you would assume that by  
7 diverting those cherries you would save your  
8 handler money. And I guess it's your hope  
9 that that saving would be passed on to you and  
10 other growers in the form of a higher return?

11 A That would be our hope, because  
12 there would be lest cost than to handling the  
13 compliance for the restricted percentages.

14 Q From previous testimony of Jim  
15 Nugent, there's no way you could ascertain  
16 what that would be, but you would expect to  
17 have a --

18 A I would expect it to be higher.

19 Q Thanks.

20 JUDGE CLIFTON: Mr. Hill?

21 EXAMINATION

22 BY MR. HILL:

1           Q       As well as a large producer and a  
2           small handler, do you see any kind of a  
3           disparate impact between small and large  
4           producers or small and large handlers from  
5           this --

6           A       No, I don't.

7           Q       And you mentioned the, this was a  
8           sign, you mentioned a five plus one product,  
9           what is that?

10          A       Well, it's a form of processing,  
11          it's five parts cherries and one part sugar,  
12          that's how we pack it, with a sugar cap runs  
13          on it.

14                    JUDGE CLIFTON:  Ms. Salehi?

15                            EXAMINATION

16                    BY MS. SALEHI:

17           Q       I was reading your testimony,  
18           could you please expand on the statement that  
19           says, I'm an on the fourth paragraph, and it  
20           starts with, we have only diverted fruit in  
21           the orchard because of the economic reasons,  
22           either the age of the tree was too young to

1 put the mechanical harvester on it, or the  
2 crop size of the particular block was below  
3 the cost threshold of harvesting it.

4 Q Sure, young trees, we have a  
5 mechanical harvester that grips onto the  
6 bottom of the tree and shakes the tree. And  
7 if the trunk diameter is too small in some  
8 blocks, it might meet the age requirement for  
9 the CIAB to divert, which I think is six  
10 years. And so we'll make a decision instead  
11 of to hurt the tree, or harm the tree, we'd  
12 rather divert that for another year and let  
13 them grow for another year, that was the one  
14 case. And then in the other year, when the,  
15 if a crop has a low corp, and I'm putting my  
16 grower hat on now, we'll sample the block on  
17 a block diversion and see if that poundage of  
18 diverting would be less than harvesting it,  
19 and that it would an economic, better for us  
20 to write that down rather than run a harvester  
21 over there for a few pounds and incur the high  
22 cost per pound of harvesting that. So that's

1 the economic decision of that, so.

2 Q Okay.

3 A That's when we made the decision  
4 to divert.

5 Q Thank you.

6 JUDGE CLIFTON: Mr. McFetridge?

7 EXAMINATION

8 BY MR. MCFETRIDGE:

9 Q Marc McFetridge, USDA, I just have  
10 a couple quick questions. How will these  
11 amendments impact the growers who do not  
12 divert tart cherries?

13 A I think that they probably bring  
14 in fruit the same to their handlers. I think  
15 their handlers are going to dictate what they  
16 want done, like what Mr. Nugent was talking  
17 about. I don't think it would, there would be  
18 a slight increase in percentage as on the  
19 restricted percentage. Other than that I  
20 don't think the growers would, they lean on  
21 their handlers. The handlers are who is being  
22 regulated, so.

1           Q       Would there be any additional  
2 costs that would be incurred by them versus  
3 being diverted?

4           A       I don't believe so.

5           Q       I just have a clarification, when  
6 using this word diverted, so basically the  
7 cherries will not leave the orchard? Do they  
8 still get picked or they fall on the ground,  
9 or I guess depending on the grower?

10          A       Abandoned is one way, some growers  
11 choose to shake them on the ground to get the  
12 fruit off the tree. It's a choice. I think  
13 after we get all done harvesting and receiving  
14 --

15                   JUDGE CLIFTON: Mr. Hedin?

16                               EXAMINATION

17 BY MR. HEDIN:

18          Q       Were you here when Mr. Facer was  
19 testifying?

20          A       Yes.

21          Q       And he went through the  
22 description of how the various orchard

1 diversions are done?

2 A Yes.

3 Q Is it your understanding from the  
4 same, can you adopt his --

5 A Yes, I agree with Tom.

6 Q Okay. And that fruit, that never  
7 comes back into a processing facility as a  
8 consequence, or after diversion, correct?

9 A That would be a violation, yeah.

10 Q Okay. Thank you.

11 JUDGE CLIFTON: What other  
12 questions are there for Mr. DeRuiter?

13 Mr. DeRuiter, can you think of  
14 anything you'd like to add?

15 THE WITNESS: No.

16 JUDGE CLIFTON: Thank you. You  
17 may step down.

18 Mr. Hill, do you want to call  
19 another witness?

20 MR. HILL: Yes. I'd like to move  
21 Exhibit 11, the statement, into admission.

22 JUDGE CLIFTON: Is there any

1 objection to Exhibit 11 being admitted?

2 MS. DESKINS: No objection.

3 JUDGE CLIFTON: Exhibit 11 is  
4 admitted into evidence.

5 (Whereupon Exhibit No. 11 was  
6 admitted into evidence.)

7 JUDGE CLIFTON: And who would be  
8 your next witness?

9 MR. HILL: Next would be Roy  
10 Hackert. And we do have a page to hand out  
11 here, which I would like to mark as Exhibit  
12 12.

13 (Whereupon Exhibit No. 12 was  
14 marked for identification.)

15 JUDGE CLIFTON: Were there enough  
16 for everyone to have one, Exhibit 12? Is  
17 there anyone that needs one?

18 All right. I'll swear you in  
19 seated. Would you first state and spell you  
20 name for us?

21 MR. HACKERT: Roy Hackert, R-o-y,  
22 H-a-c-k-e-r-t.

1 JUDGE CLIFTON: Thank you. Would  
2 you raise your right hand, please?

3 Whereupon,

4 ROY HACKERT,  
5 called as a witness herein, after having been  
6 first duly sworn, was examined and testified  
7 as follows:

8 JUDGE CLIFTON: Mr. Hill?

9 EXAMINATION

10 BY MR. HILL:

11 Q We're on the afternoon, the  
12 packet. I see you have a statement. Could  
13 you please read it for the record?

14 A Sure. Roy Hackert, 4262 West  
15 Kissler Road, Ludington, Michigan. I, along  
16 with my sons, Brian, David and Jason operate  
17 a family farm in Mason County. I've been a  
18 grower since 1970 and a processor and grower  
19 since 1973. We support the amendment for in-  
20 orchard diversion that is currently being  
21 proposed.

22 We need to look at this not as a

1 grower issue, but also a benefit to  
2 processors. With the old Cherry Marketing  
3 Order, which I served on the board, the order  
4 for grower diversions, certificate diversions,  
5 were bottom line credits. And that's the  
6 order prior to this one that, I think it  
7 expired in '89 or something like that.

8           When the new order was drafted, I  
9 believe we thought diversion credits would be  
10 the same. And I can expound on that after.  
11 The problem exists in large crop years where  
12 the rules don't encourage in-orchard  
13 diversion. If there is a small restriction,  
14 up to 20 percent, it doesn't affect the value  
15 to the grower. Now that we're faced with  
16 higher restrictions, 20 to 55 or more, the  
17 value has decreased to a point where it's  
18 better to harvest and deliver.

19           JUDGE CLIFTON: Mr. Hackert, I  
20 want you to re-read that just so that  
21 everybody knows that 20 to 55 were  
22 percentages, if you would.

1 THE WITNESS: Yeah, okay. Now  
2 that we are faced with higher restrictions, 20  
3 percent to 55 percent or more, the value has  
4 decreased to a point where it's better to  
5 harvest and deliver. This has a negative  
6 impact by creating large surpluses in the  
7 industry. The value is less compared to the  
8 credits because a processor has to add the  
9 tonnage to what they handle.

10 In large crop years with bottom  
11 line credit, the grower will be encouraged by  
12 the processor to defer ground, defer food on  
13 the ground because they can get full credit  
14 and have the same values as other credits.  
15 The grower that diverts cherries on the ground  
16 should get the same credit value as export or  
17 market expansion because revenue on these  
18 cherries is zero.

19 The processor involved may not  
20 have access to export or market expansion.  
21 His only choice may be to have his growers do  
22 in-orchard diversion and collect the

1 certificates. With bottom line credits in  
2 place, a grower diversion will reduce  
3 carryover and increase grower price. The  
4 grower's cost is the cheapest with in-orchard  
5 diversion. The grower does not incur handling  
6 costs, freight and association fees.

7 The supply formula will change,  
8 but we believe that's okay. I spent a lot of  
9 time on committees to work toward creating a  
10 better marketing order. We think it is time  
11 for another change in the order so it operates  
12 better for the future.

13 JUDGE CLIFTON: Let's start with  
14 Mr. Hill's table for questions for Mr.  
15 Hackert.

16 MR. HEDIN: Thank you, your Honor.

17 EXAMINATION

18 BY MR. HEDIN:

19 Q Roy, in your testimony you say  
20 it's better to harvest and deliver. Can you  
21 expound on that a little bit? Why is it  
22 better?

1           A       Well, it comes to, like when we  
2       set our marketing plan as a processor, we'll  
3       decide how much food we're going to process  
4       first and then how much, we'll know the  
5       percentages, preliminary percentages for the  
6       Marketing Order Board, which I serve on the  
7       Board also.

8                   And then once that's established  
9       we'll say okay, we harvest this much for free  
10      tonnage, we think we can export this much, we  
11      think we can have market expansion for this  
12      much. And then we would hope that the bottom  
13      line credits for on the ground would be there  
14      so that, and get the full credit, not this  
15      reduced credit because we have to add it to  
16      our handle.           So, and when you get to  
17      this point of higher restriction, it's better  
18      to harvest and deliver because you don't get  
19      half the credit that you normally would get  
20      for the market expansion export, and you take  
21      your chances then in the marketplace of either  
22      demand release, and up in the, I call it a

1 cesspool, it's a secondary pool. Because  
2 that, you can hardly get out of that, it takes  
3 credits to get out.

4 And so when you factor all that  
5 in with the way it was, it's better to deliver  
6 and harvest and take your chances. This will  
7 be a lot more orderly marketing plan that  
8 we'll be able to set forth, knowing we can get  
9 bottom line credits for diversion on the  
10 ground.

11 Also, though I believe it'll  
12 still, diverting cherries on the ground will  
13 still be the last option we'll use. It would  
14 definitely not be a primary option for  
15 compliance, getting an entire company in  
16 compliance with the regulations. We'll use  
17 export, market expansion, will be the primary  
18 ones and then we'll look at how much room we  
19 have in the primary pool. We'll probably not  
20 want to try to be in the cesspool even though  
21 we might end up there because a crop may pick  
22 out higher.

1                   So we'll be very conservative on  
2                   the amount we ask our growers to put on the  
3                   ground. And that'll be our last option. And  
4                   I think that'll be the last option of most  
5                   processors. I don't think that's a primary  
6                   option unless he's in a mature market and he  
7                   has no other options, no export, no market  
8                   expansion. But his only way to comply would  
9                   be on the ground and that would utilize there.  
10                  But I think there's very few processors in  
11                  that arena.

12                  Q        So it's the heavy discounting of  
13                  the grower certificates as recurring and  
14                  constructive that presents the problem?

15                  A        Yes. In 2009, you know, at our  
16                  grower meeting, we're a cooperative, and I'm  
17                  president of the cooperative, and we said,  
18                  well, we'd better process them because the  
19                  cost is so costly to add this to our tonnage,  
20                  so we did. We ended up in a cesspool and we  
21                  always carried charges. Hindsight it was a  
22                  bad decision, but the decision was made and

1 the cost was so great of having this  
2 percentage so high.

3 And so it'll be an easier decision  
4 in the future with this, as a, it'll just be  
5 an orderly way to market our fruit.

6 Q You also talked about the old  
7 marketing order and the treatment of grower  
8 diversions. Now I realize that the old order  
9 with a grower rather than a handler, but  
10 exactly how were those old orchards, diversion  
11 credits used in the old order?

12 A Well, it definitely was a handling  
13 order and this is a processor order or  
14 handling order, but when a grower harvests his  
15 crop, they use the random roll method. And a  
16 lot of growers, that was the best way because  
17 the credits end up being a bottom line, but  
18 the burden was their burden by themselves.  
19 Whatever decision they made was their decision  
20 because they got the bill from the processor,  
21 the bill to process their fruit and the CIV  
22 actually held the fruit in their name. We had

1 to actually turn the title over to the  
2 marketing board for that fruit.

3 So if he did do a random roll,  
4 which I think there was another couple options  
5 to do, but random roll was the most popular  
6 back then. But he got a full, he didn't get  
7 charged against his account then for the fruit  
8 that was processed, and it was a full credit,  
9 it wasn't where, the handler did not have to  
10 add that tonnage onto his handle.

11 And so, I know I went to a lot of  
12 meetings on this new order, and I think a lot  
13 of assumptions were rose when you'd see bottom  
14 line credits. But after we got into it, first  
15 organization meeting we were at we found out  
16 that hey, somebody's got to account for this  
17 fruit. And it became the first handler to add  
18 that fruit onto its handle. And I don't know  
19 why that decision was made but I guess  
20 somewhere it slipped through the cracks on the  
21 original implementation of the grower.

22 Q So is it correct that you, your

1 understanding is that we're going back to what  
2 was the norm before?

3 A Yes, very much so.

4 Q Do you think that that will have  
5 any adverse consequences either to you as the  
6 processing entity or you as the growing  
7 entity?

8 A No, I think, I think I mentioned,  
9 Tom mentioned that, you know, you are going to  
10 work with your processor. He's the one that's  
11 going to market your fruit for you and  
12 actually buy your fruit. This will make it a  
13 more orderly marketing plan. And still, I  
14 said earlier, they'll still use the ground as  
15 a last resort, it will not be a primary resort  
16 at all.

17 But at least when they do the last  
18 resort, they'll know they get a bottom line  
19 credit and not end up in places where I think  
20 a lot of processors ended up in 2009, excess,  
21 cesspool quantities they carried. We were  
22 able as a processor, we had to buy our way out

1 but it took grower money to buy our way out of  
2 the cesspool.

3 So growers definitely will get a  
4 lot more money for that portion that goes on  
5 the ground because we don't have to give that  
6 money to somebody else to get this credit, we  
7 can do it in-house and our growers will get a  
8 bigger return, so.

9 Q Do you anticipate that your grower  
10 base will, in fact, utilize this a little bit  
11 more than the old system?

12 A You know, we're a cooperative so,  
13 you know, cooperatives, it's one for all, all  
14 for one. I may not have said that, but they  
15 usually do collectively what we recommend, and  
16 we have that plan behind it so I think that  
17 our growers will participate in orchard  
18 diversion. Because they saw the other side of  
19 not doing it a couple times, not just once,  
20 but a couple times in large crops. And large  
21 crops is one that's going to be used.

22 You know, I think in my testimony,

1       20 percent or less, it won't be used. But at  
2       least when they get bigger it'll really, it  
3       needs to be used. I mean, what are you going  
4       to do with the fruit? We can't sell it. And  
5       so just collect storage bill, do have a  
6       freezer. But that one year we had to truck  
7       our cherries, the new crop cherries, to  
8       Indiana because our freezer was full of  
9       cesspool cherries. So, and that wasn't a very  
10      comfortable either. So a lot of lessons  
11      learned. This is a great amendment for the  
12      order and for long term future.

13             Q       Roy, some people have suggested to  
14      me that encouraging increased diversion might  
15      short our supplies for a succeeding short crop  
16      year. How do you feel about that?

17             A       You know, we had the 50 million  
18      primary pool. I think most people in their  
19      marketing plan will take their full percent of  
20      that. I know there's talk of increasing that  
21      tonnage to up to maybe 75 or 100 million  
22      pounds. They think that would be a bigger

1 safety zone. But most processors will fill  
2 that, they will not take the chance of being  
3 shorted cherries if the market in the next  
4 crop year is short.

5           You can see by the numbers  
6 presented why the industry needs a marketing  
7 order, it's because we can't crop consistently  
8 year in and year out. We're just like the  
9 biggest saw you ever saw in the world, it's up  
10 and down. And if a crop cropped on averages,  
11 good averages year in and year out, this  
12 industry would not need a marketing order.  
13 But we do need it because of this crop  
14 variation.

15           So I don't know if I've answered  
16 your question now, but I really believe that  
17 it won't be overused. I think it would be the  
18 last, last resort because they'd rather  
19 protect the markets they have. Each market  
20 you have today in this economy is so important  
21 that they're not going to short themselves.  
22 By shortening themselves we drop too much on

1 the ground. It's possible it could happen,  
2 but I think that's a rare, you're going to see  
3 very conservative on the ground with this rule  
4 in place.

5 Q Mr. Facer talked about way back  
6 when, the promulgation time of the order that  
7 numbers 25 cents and 25 percent was fixed on  
8 the high side, and that had the consequence  
9 we've seen been known, they probably wouldn't  
10 have gotten the order passed. Do you agree  
11 with him on that?

12 A Well, you know, any industry that  
13 has economic bad condition is open for some  
14 change or open for something that looks better  
15 down the road. And they had the experience of  
16 the prior marketing order which I served on  
17 that board also. And that was successful just  
18 that that order could not be amended, it had  
19 to be re-voted on each time anything was done  
20 to it. There was a lot of amendments that  
21 that order needed because at the time you  
22 start ordering, you don't know everything, you

1 know later on. It's the same with this order.  
2 But this order was in place so that we could  
3 amend it without losing it. And so with this  
4 amendment it just makes it a lot better, and  
5 we made other amendments, and we need more, we  
6 need more amendments. But as we grow and  
7 things change, it's unfortunate we do need to  
8 make amendments. Otherwise you have a tool  
9 that's obsolete. And we know what obsolescent  
10 does, it doesn't continue, so.

11 MR. HEDIN: I have no further  
12 questions, your Honor. Thank you.

13 JUDGE CLIFTON: Thank you, Mr.  
14 Hedin. What other questions are there for Mr.  
15 Hackert?

16 Mr. Hackert, you were talking  
17 about a pool, and it sounded to me like you  
18 were saying cesspool.

19 THE WITNESS: That's correct.

20 JUDGE CLIFTON: What is that?

21 THE WITNESS: Well, it's the  
22 secondary pool that you end up after the

1 primary is full. So if you had this tonnage  
2 you packed, and the percentage is filled for  
3 the primary pool, then you end up with a  
4 secondary pool, which I've named it the  
5 cesspool, which it really is. I mean it's  
6 hard to get out and you can't borrow any money  
7 on it, you can't pay the growers any money.  
8 Your growers are, you're covering the cost of  
9 carrying this and so it's a pretty easy way to  
10 call it the cesspool.

11 JUDGE CLIFTON: Are you not  
12 permitted to market it until the primary pool  
13 is gone or something like that?

14 THE WITNESS: Yes. You can't  
15 market it until the primary pool is gone,  
16 other than you taking credits that, again, the  
17 credits you'd have as a grower, credits on the  
18 ground to get it out, but that penalty's so  
19 bad that you kind of live with it until you  
20 figure another way to get out or in market  
21 expansion or export. And we know export  
22 market, the prices back to the grower isn't

1 very good compared to, because we're competing  
2 with Poland, which is in the EU Union and  
3 we've had a tariff going to Poland.

4 So, it's a costly deal to get out  
5 of it. It's best to have this tool and won't  
6 have the cesspool as much. We might end up  
7 somewhere, because you can't get it exactly  
8 because we're working off estimates -- final  
9 in September, but this is just a plus.

10 JUDGE CLIFTON: Mr. McFetridge?

11 EXAMINATION

12 BY MR. MCFETRIDGE:

13 Q Mark McFetridge, USDA. Mr.  
14 Hackert, I'd also want to do, I want a  
15 clarification on, I know you said you're  
16 representing both the grower and the handler?

17 A Yes.

18 Q And I wanted to, based on the  
19 Small Business Administration definition of a  
20 small business having annual receipts of less  
21 than \$7 million and a small agricultural  
22 producer having annual receipts of less than

1       \$750,000, how would you classify your tart  
2       cherry operations?

3             A       As a grower, you mean, first?

4             Q       Yes.

5             A       Probably large, then.

6             Q       Okay.

7             A       Well no, under seven million,  
8       small.

9             Q       So that's for, as a handler --

10            A       Well the handler would be just for  
11       that teeter totter selling.

12            Q       Okay. And then as a grower --

13            A       Under seven million.

14            Q       Under, it's \$750,000 --

15            A       Well as a grower we'd be over  
16       that.

17            Q       Okay, all right. Thank you very  
18       much. And based on these definitions of a  
19       small agricultural producer or small grower,  
20       would you see these proposed amendments having  
21       any adverse effects on small growers or  
22       handlers?

1           A       No. We have large growers and  
2           small growers in our cooperative and we think  
3           it's an advantage to all.

4           Q       Thank you very much.

5                    JUDGE CLIFTON: Mr. Johnson?

6                           EXAMINATION

7           BY MR. JOHNSON:

8           Q       Hi Roy. One question. Do you see  
9           as, under this proposal, do you envision  
10          growers, a widespread diversion of, to grow a  
11          product? And if you do, given the situation  
12          in 2009 when there was adverse publicity  
13          because of product being dropped, do you think  
14          the benefits would outweigh any negative PR  
15          you might get from the dropping of, the  
16          diverting of product?

17          A       Well, I believe part of that  
18          publicity was growers weren't getting hardly  
19          anything for what they did, dropped  
20          underground. And now, I believe that price  
21          will increase because it'll have the same  
22          value as the other credits, and it'll just be

1 a better way to comply with the restriction.  
2 And so I don't, I think the publicity on this  
3 will be more positive. I mean, you still  
4 might get a couple growers that don't have a  
5 home for their fruit, that aren't tied to any  
6 processor, that sort of thing, but most  
7 growers of tart cherries are tied somewhat  
8 close to their processors and agree to their  
9 marketing plan. And this will be so much  
10 easier for a processor to develop a marketing  
11 plan that makes sense, instead of the one we  
12 have today.

13 Q Thanks.

14 JUDGE CLIFTON: Mr. Hedin?

15 EXAMINATION

16 BY MR. HEDIN:

17 Q Roy, you mentioned discussion  
18 about, and I hate to bring this element up,  
19 but we have the preliminary and the final  
20 numbers and right now those have been  
21 changing, they will change by definition but  
22 does the fact that bottom line credits will

1 have a given value regardless of what happens  
2 with the pack out, enhance their work to you  
3 as the processor?

4 A Well, again, it depends on the  
5 crop size. You know, the large crop is where  
6 all this will come to play, and that's when we  
7 have, when they're all the same value, you'll  
8 be able to, like I said, earlier said, a good  
9 marketing plan that makes sense that, so your  
10 growers can get the largest return. We're a  
11 processor but we're a grower/processor. We're  
12 owned by growers, so our incentive is to get  
13 return growers as much money as we can and  
14 still maintain a strong profit. So we see  
15 this as a plus, plus for that to get more  
16 grower money back in their pockets.

17 To add to that, you know, 2009, we  
18 actually had to take money out of our  
19 cooperative and give it to one of our  
20 competitors because he had some credits to  
21 sell. That doesn't set very well, you know.  
22 We enhanced our competitor. And these

1 credits, we would manage our own business this  
2 way with this, and that's where it should be.  
3 We should not be helping a competitor.

4 Q Thank you.

5 JUDGE CLIFTON: What other  
6 questions are there for Mr. Hackert? Mr.  
7 Engeler, you thought of something? All right.  
8 Mr. Hackert, is there anything else you'd like  
9 to add?

10 MR. HACKERT: Yes. I think we  
11 really need this for 2012 crop. You know, the  
12 weather conditions, we had a little experience  
13 here in Michigan, we had snow when we left  
14 this morning. And so all conditions are  
15 coming for us to have a favorable crop in the  
16 condition. And so, and you never know. I  
17 mean, we could have a frost two weeks from now  
18 and hurt us bad, but traditionally when we get  
19 late spring like this we're going to have a  
20 large crop. And this rule needs, really needs  
21 to be part of our marketing plan this coming  
22 year.

1                   And I appreciate the time you  
2                   spent and to fast track this. But I think,  
3                   hopefully when you're done with these  
4                   hearings, between Utah and here, that you're  
5                   going to find how important this is to the  
6                   industry. It's a tool we need so our growers  
7                   can get more money. Because in the testimony  
8                   earlier, you know, and I believe some of these  
9                   numbers are correct, the cost of production is  
10                  pretty high. And this year it's going to be  
11                  higher yet. We got higher sugar costs, we got  
12                  higher plastic costs, you know, our, more  
13                  fuel, our capital bills are more. I mean, I'm  
14                  jumping between grower and processor here, but  
15                  we need every tool we can get. So, and the  
16                  growers, you saw our returns. They're not  
17                  where they need to be for growers. And this  
18                  will really help.

19                  One other thing I'd like to add,  
20                  in Tom's report, there's one page here, I  
21                  don't know if you're going to spend any time  
22                  on this, but I think it's page 10, I think

1 there's an error in 2009 on grower pricing.

2 JUDGE CLIFTON: Is that the top  
3 page or?

4 THE WITNESS: Page 10 at the  
5 bottom.

6 MR. HEDIN: Which report are you  
7 referring to?

8 THE WITNESS: I think it was  
9 Tom's.

10 JUDGE CLIFTON: Okay, now I'm  
11 in --

12 THE WITNESS: No, no, it's not  
13 Tom's, okay, here it is, U.S. Tart Cherry  
14 Crops decision, who presented that, marked it.  
15 Okay I think that hopefully, I'm sure when you  
16 go down to Oregon here, page 10, the grower  
17 price was not 85 cents.

18 JUDGE CLIFTON: Okay. So we're in  
19 Exhibit 7, we're on page 10, and help walk me  
20 to --

21 THE WITNESS: We'll go to the top  
22 and find Oregon and we went --

1 JUDGE CLIFTON: Okay.

2 THE WITNESS: -- down to 2009.

3 JUDGE CLIFTON: All right.

4 THE WITNESS: I believe there's an  
5 error of some sort there. And I've never  
6 known USDA to make an error but it's possible.  
7 And then if you move over to Washington, --  
8 washing 47 cents, I think that's an error. I  
9 think it's more of a consensus between this  
10 around 20 cents a pound or 25 cents a pound  
11 probably is where 2009 crop. And so I  
12 wouldn't want you to think that one state's  
13 unable to pay growers a lot more than another.  
14 And I think that, hopefully that, you know,  
15 that I can make more emphasis that this will  
16 be the last resort processors will use. It's  
17 not the first resort. We've got too many  
18 other tools to use to get growers to get a  
19 return for the dollar. So if anybody thinks  
20 this is primary use of compliance, it'll be  
21 the last use. I think I can speak for a lot  
22 of processors.

1 MR. HEDIN: Your Honor, can I  
2 follow up on that?

3 JUDGE CLIFTON: You may, Mr.  
4 Hedin.

5 BY MR. HEDIN:

6 Q Roy, can you look at page eight,  
7 the last two lines there, '09 and '10, showing  
8 the US product of 358.9 and 190.4  
9 respectively. And then on page ten it shows  
10 grower prices for the same years at 19 and 21  
11 cents respectively. Earlier you talked about  
12 the impact of the large carryover generated  
13 from '09. Do you think those prices reflect  
14 that fact?

15 A Oh, I think very much so. I know  
16 as president of our cooperative we still have  
17 not paid off 2009 crop because we still got  
18 some cherries in inventory yet that we  
19 probably shouldn't have had, and I know we  
20 wouldn't have had if we would have had this  
21 rule in our tools to use to market this crop.  
22 And so our growers are still hanging out

1       there, you know, how much are we going to get  
2       for 2009, I said well, storage keeps eating  
3       things up, and three-tenths have said, or is  
4       it roughly is it a month?

5                 But we're still in that seven  
6       cents a pound on the year, and here we are,  
7       what year is it, you know, and here we still  
8       got 2009 crop inventory.

9                 Q       Thank you.

10                JUDGE CLIFTON:  Mr. Hackert, if  
11       you were to have the rule available for the  
12       2012 crop, when would the final rule have to  
13       be published in the federal register in order  
14       for that to work for your operation?

15                THE WITNESS:  I believe somewhere  
16       around the first of July would be sufficient.  
17       A couple days after would be okay.  But  
18       somewhere in there so we know what we're  
19       doing.  But this later crop we have coming, I  
20       think that, I think Mr. Johnson's guarantee is  
21       we'd have this for 2012.

22                JUDGE CLIFTON:  So, just so I'm

1 clear, you're saying if you had it by July of  
2 2012 you could use it for 2012?

3 THE WITNESS: No, did I say '12, I  
4 said '11, I meant '11.

5 JUDGE CLIFTON: You didn't say.

6 THE WITNESS: Oh, okay, I retract  
7 all that. Okay. It's 2011 we need this for.

8 MR. HEDIN: For the next harvest?

9 THE WITNESS: This next harvest  
10 coming up, yeah. And so, and I know a lot of  
11 effort's been put forth by USDA to fast track  
12 this, and so we appreciate that. Except that  
13 hopefully we don't get bogged down somewhere.  
14 And I know Utah will I think be all positive,  
15 I believe. And I think you'll see Michigan is  
16 somewhat positive or all positive. I didn't  
17 see any negatives.

18 And it's very seldom you get a  
19 motion across the board, the CIAB Board that  
20 passes, you know, to the level instead with --  
21 so that's how serious I think everybody feels  
22 they need it. There's some people that's not

1 for it but for different reasons than not for  
2 what's best for the industry. I think the  
3 people you've seen testify here today really  
4 believe they're testifying what's best for the  
5 industry and for the future.

6 JUDGE CLIFTON: Any other  
7 questions of Mr. Hackert?

8 MR. HILL: I would like to enter  
9 this into evidence --

10 JUDGE CLIFTON: Is there any  
11 objection?

12 MS. DESKINS: No objection.

13 JUDGE CLIFTON: Exhibit 12 is  
14 admitted into evidence.

15 (Whereupon Exhibit 12 was admitted  
16 into evidence.)

17 JUDGE CLIFTON: Thank you, Mr.  
18 Hackert, you may step down.

19 MR. HEDIN: Your Honor, I know  
20 we're running a little bit past schedule, but  
21 we have only one more person in the crowd I  
22 believe, who is planning to testify. So could

1 we proceed with that and then take lunch?

2 JUDGE CLIFTON: Well, let me see  
3 what else we're going to do today. Is this  
4 the last witness that you folks have, today?

5 MR. HEDIN: I will be following  
6 up.

7 JUDGE CLIFTON: Well, let's take a  
8 little break and confer with the gentleman who  
9 would be testifying and see if he would like  
10 to have lunch first and then testify.

11 MR. HACKERT: He rides with me so  
12 I don't think he wants --

13 JUDGE CLIFTON: You don't think  
14 he's going to what?

15 MR. HACKERT: I --

16 JUDGE CLIFTON: So you'd like for  
17 him to be able to testify?

18 MR. HACKERT: Yes.

19 JUDGE CLIFTON: All right.

20 MR. HACKERT: That way they can  
21 leave.

22 JUDGE CLIFTON: Very good. You

1 may come forward. I don't know what that does  
2 to the schedule for the courtroom. Let's go  
3 off the record a minute.

4 (Off the record.)

5 JUDGE CLIFTON: All right. While  
6 we were off record Mr. Hill called Daryl  
7 Peterson. Mr. Peterson, would you please  
8 state and spell both your names?

9 MR. PETERSON: Daryl Peterson, D-  
10 a-r-y-l, P-e-t-e-r-s-o-n.

11 JUDGE CLIFTON: Thank you, and  
12 I'll swear you in as you're seated.  
13 Whereupon,

14 DARYL PETERSON,  
15 called as a witness herein, after having been  
16 first duly sworn, was examined and testified  
17 as follows:

18 JUDGE CLIFTON: Thank you.

19 EXAMINATION

20 BY MR. HILL:

21 Q Good afternoon, Mr. Peterson.  
22 Could you tell us a little bit about yourself?

1           A        Yes.  I operate a management  
2           company called Bushel Basket Orchard,  
3           Incorporated.  We operate in Mason County.  We  
4           manage properties for over 20 different  
5           owners.  And we grow tart cherries, sweet  
6           cherries and apples, mostly.  The handler for  
7           our operation is Michigan Food Processors  
8           Cooperative, of which Mr. Hackert is the  
9           president.

10                    And so when Mr. Hackert says that  
11           he has to convince his growers of his  
12           marketing plan, I'm one of those growers he's  
13           got to convince.  So I would, in speaking for  
14           the Order, I am in favor of the amendment  
15           changes that are needed to make orchard  
16           diversions equivalent to other diversion  
17           credits.

18                    To give you an example of how that  
19           would work in our operation, because I manage  
20           properties for a number of different  
21           producers, in the event we have a weather  
22           event, we may abandon a particular block of

1 fruit. That may be, happen to belong to one  
2 of the producers I'm managing for. So then we  
3 would prorate his value based on the total  
4 that we harvest in our operation. So we can  
5 pick and choose which quality is the best to  
6 divert. And we have done that before, but the  
7 incentive of not getting pound for pound  
8 credit has been a deterrent to doing that.

9           So it's my opinion that we do need  
10 these changes to the marketing order to make  
11 our marketing plan, which Mr. Hackert will  
12 present next spring, or this spring, something  
13 we got a better handle on.

14           The other comment I'd like to make  
15 is in regards to how rules have unintended  
16 consequences. And when this rule, when I  
17 first, when the marketing order was first  
18 adopted and I became aware of this rule, and  
19 the way it was to be operated, it was like, I  
20 can't believe that. If I take cherries and  
21 don't deliver them, by choice, the person who  
22 I give the certificate to for those non-

1 harvested cherries has to count them as  
2 harvested cherries. Makes no sense to me.  
3 It's a rule that makes no sense, thus the  
4 amendments.

5 So, that's the comments I would  
6 like to make.

7 Q Can you please tell us what was  
8 the name --

9 A Oh, Bushel Basket Orchards,  
10 Incorporated.

11 Q And is your, are you a small or  
12 large entity?

13 A I guess we would be classified as  
14 large. But I'd like to make a point, I have  
15 a couple of people who I manage a five acre  
16 cherry plot for, so.

17 Q You know, you mentioned the issue  
18 of grades, or quality and proration, can you  
19 explain for those who are new to the industry  
20 what quality, the quality issues and how they  
21 reflect your payment schedules?

22 A Well, generally the pricing for

1 the product from our cooperative is based on  
2 a percentage score. And the general breaks  
3 are like if it's 92 to 100 is one price, if  
4 it's an 88 to a 92 grade it's a different  
5 price, and if it's 85 to 88 it's a third price  
6 and then anything below 85 is considered a  
7 juice price.

8 Q So, the ability to divert some of  
9 the poorer quality is really an important  
10 factor in determining how to handle your  
11 various --

12 A Right, in terms of our operation.  
13 If we have a site that we know that quality  
14 has deteriorated for whatever reason, we can  
15 do that diversion. And with these amendments  
16 then get equivalent credit.

17 Q Thank you. As a large producer,  
18 you said you manage very small producers?

19 A Right.

20 Q Are any of them, have you heard  
21 any concerns about how this may affect them,  
22 this new regulation --

1           A       At this point, no. No one's  
2           commented on it. In some cases if they get  
3           their rent or check payment based on the  
4           operation, they're happy, we move on.

5                    JUDGE CLIFTON: What other  
6           questions are there for Mr. Peterson?

7           BY MR. HEDIN:

8           Q       Can you describe for us some of  
9           the, are you on the Board at Michigan Foods?

10          A       No.

11          Q       And what are some of the other  
12          activities, these are -- activities you engage  
13          in?

14          A       I'm on the Michigan Cherry  
15          Committee. I serve, I'm on the Board of  
16          Directors of Indian Summer. And I'm involved  
17          in several other events, locally.

18          Q       Thanks.

19                    JUDGE CLIFTON: Do you have a  
20          question, Ms. Salehi?

21                    MS. SALEHI: Yes, please.

22                                    EXAMINATION

1 BY MS. SALEHI:

2 Q Mr. Peterson, you are speaking  
3 about the adverse impact or unintended  
4 consequences of rules earlier. I wanted to  
5 ask you, and this might sound like I'm asking  
6 you to speculate, but do you see any  
7 foreseeable adverse impact or effect of this  
8 proposed amendment upon the growers?

9 A In my case I do not, because our  
10 cooperative, one of our goals have been to  
11 figure out how many different ways we can  
12 market cherries. And we can market cherries  
13 about every way you can think of. And so  
14 therefore having this rule won't adversely  
15 affect our marketing ability if, for example,  
16 we were only an exporter. So I don't see an  
17 issue in that case.

18 Q May I continue? Do you agree with  
19 Mr. Hackert that this is a last resort as  
20 opposed to a first?

21 A Yeah, it's our philosophy, and  
22 we've been working with the cooperative, and

1 I have been working in association with Mr.  
2 Hackert since 1990. And our philosophy is we  
3 don't grow the fruit to put it on the ground.  
4 It's a last resort.

5 Q Do you think that philosophy is  
6 shared in the industry?

7 A I would guess probably because  
8 look what happened in 2009. We put up far  
9 more cherries than we probably should have.

10 Q Okay, thank you.

11 JUDGE CLIFTON: Are there other  
12 questions for Mr. Peterson?

13 Mr. Peterson, when you answered  
14 Mr. Hill by saying you believe that your  
15 enterprise is large, did you have a dividing  
16 line in your mind between what's small and  
17 what's large?

18 THE WITNESS: Well, the other  
19 gentleman was asking the questions, so as a  
20 grower we're above his 750,000.

21 JUDGE CLIFTON: Okay. Is that  
22 what you wanted to know, Mr. Hill?

1 MR. HILL: That's the way I  
2 intended the answer.

3 JUDGE CLIFTON: All right. Are  
4 there other questions? All right. Thank you,  
5 you may step down, Mr. Peterson. Did you have  
6 anything you wanted to add?

7 THE WITNESS: I appreciate taking  
8 the extra time so my testimony could get in so  
9 I have a ride home.

10 JUDGE CLIFTON: Before you all  
11 leave for lunch, I want to know is Mr.  
12 DeRuiter still here? Mr. DeRuiter's exhibit,  
13 Exhibit 11, does close with the request that  
14 the amendment will be in place by the 2012  
15 crop season. Do you think, does anybody know  
16 whether Mr. DeRuiter was really talking about  
17 2011?

18 MR. HEDIN: May I?

19 JUDGE CLIFTON: Yes.

20 MR. HEDIN: I'm pretty sure that  
21 he was thinking that it was the 2012 crop  
22 year, not thinking that we would be able to

1 accomplish this by July of next year.

2 Notwithstanding Roy's wishes.

3 JUDGE CLIFTON: Not, but it would  
4 be unlikely it could be done by July of 2011?

5 MR. HEDIN: Right.

6 JUDGE CLIFTON: Yes. Well, that  
7 would be very, very, very fast, but I  
8 understand --

9 MR. HEDIN: We'll adopt Roy's  
10 position.

11 JUDGE CLIFTON: Yes, I understand  
12 the problem is you're about to have another  
13 bumper crop. I understand. And nobody knows,  
14 but.

15 MR. HEDIN: Odds are that we will.  
16 I think we will get --

17 JUDGE CLIFTON: Can you offer  
18 something?

19 MR. NUGENT: I'm quite sure he did  
20 mean 2012 -- he didn't think it was possible  
21 to get it through for '11.

22 JUDGE CLIFTON: All right, and --

1 MR. NUGENT: He wanted to get it  
2 as soon as possible and I'm sure that's what  
3 he meant --

4 JUDGE CLIFTON: All right. And  
5 you are Mr. Nugent?

6 MR. NUGENT: Yes.

7 JUDGE CLIFTON: Okay. Okay. I  
8 don't know whether it's possible to do it this  
9 fast.

10 MR. HEDIN: Martin is shaking his  
11 head yes.

12 JUDGE CLIFTON: Mr. Engeler, can  
13 you comment?

14 MR. ENGELER: I can offer an  
15 opinion on that. I don't think it's, not with  
16 the things that need to be done and the time  
17 frame between now and July of this year that  
18 it's possible. Because ultimately this will  
19 have to go to a grower vote, and there's  
20 several steps that we have to do before that,  
21 and comment areas and so forth. I don't think  
22 it's physically possible to do it this year.

1 JUDGE CLIFTON: Yes, you are Mr.  
2 Facer?

3 MR. FACER: Yes, I think the  
4 concern -- so we would all love Roy's position  
5 of 2011, no one would like 2013 and 14.

6 JUDGE CLIFTON: All right.  
7 Anything further, Mr. Peterson?

8 THE WITNESS: No.

9 JUDGE CLIFTON: All right, thank  
10 you. You may step down.

11 How long will we take for lunch?  
12 What would you suggest, Mr. Hill?

13 MR. HILL: 45 minutes is fine.

14 JUDGE CLIFTON: Okay. Does that  
15 work for everybody?

16 MS. DESKINS: I would think an  
17 hour.

18 JUDGE CLIFTON: I'm not familiar  
19 with the neighborhood at all. I don't know  
20 where we can go. If you're in a large group  
21 you're not apt to get waited on as quickly,  
22 but --

1 MR. HILL: Okay, we'll do an hour,  
2 hour's fine.

3 JUDGE CLIFTON: Hour? All right.  
4 It's about 1:30 now, please be back and ready  
5 to go at 2:30.

6 (Off the record.)

7 JUDGE CLIFTON: We're back on  
8 record at 2:37. Mr. Hill?

9 MR. HILL: Yes. We're going to  
10 call Randy Willmeng.

11 JUDGE CLIFTON: Please make  
12 yourself comfortable and be seated. And would  
13 you state and spell your full name for me?

14 MR. WILLMENG: Randy Willmeng, R-  
15 a-n-d-y, W-i-l-l-m-e-n-g.

16 JUDGE CLIFTON: All right. W-i-l-l-  
17 l-m-e-n-g?

18 MR. WILLMENG: Yes.

19 JUDGE CLIFTON: Thank you. Would  
20 you raise your right hand, please?

21 Whereupon,

22 RANDY WILLMENG,

1 called as a witness herein, after having been  
2 first duly sworn, was examined and testified  
3 as follows:

4 JUDGE CLIFTON: Thank you. Mr.  
5 Hill, you may proceed.

6 EXAMINATION

7 BY MR. HILL:

8 Q Good afternoon, Mr. Willmeng.

9 A Hi.

10 Q How are you today?

11 A Good.

12 Q Well, could you tell us a little  
13 bit about yourself and why you're here?

14 A I'm a cherry grower from southwest  
15 Michigan. Come from a family farm, been there  
16 over 100 years. I raise approximately 100  
17 acres of cherries. I'm affiliated with CIAB,  
18 I'm the director from CIAB, Southwest  
19 Michigan. I'm also on the CMI Board which is  
20 the Cherry Marketing Institute Board which  
21 does advertising for the cherry industry. And  
22 I'm on Coloma Frozen Food Board, which is

1 situated in Coloma, Michigan which processes  
2 cherries, apples, blueberries, asparagus and  
3 other crops.

4 Q Okay. So obviously you're aware  
5 of the purpose that we're hear, so could you  
6 tell us about your feeling about the proposed  
7 amendment?

8 A We got an amendment to, yes,  
9 change the diversion certificates for growers.

10 Q And what's your position on these  
11 proposed amendments?

12 A I think it's, I think it's a good  
13 thing, especially for the growers. Number  
14 one, I believe it should put more money into  
15 grower hands. It should become a lot easier  
16 to use, a lot easier to understand, and I  
17 think in the big crop years we'll end up  
18 putting more crop on the ground because of the  
19 way we will be using these in the future. So  
20 I think it's a good deal for the growers,  
21 especially.

22 Q Now, what basis do you use to say

1 that it's going to put more money in grower  
2 hands?

3 A Well, in the past as the diversion  
4 goes up, as you know if you have 100 pounds of  
5 cherries and there's a 30 percent diversion,  
6 you need 130 pounds, the processor does,  
7 because somebody has to pay for that diversion  
8 and it falls on the processor. So if you go  
9 up to a 50 or 60 percent diversion, all of a  
10 sudden the processor has only 50 percent worth  
11 of cherries to use to remove product from  
12 storage and whatnot.

13 Therefore it gets to the point  
14 where they become worth less and less money to  
15 the processor, so in the end your processor  
16 will tell you to harvest them all. Because  
17 you have a bigger chance of having a smaller  
18 crop next year than you do to put them on the  
19 ground and not get any money for them. And as  
20 a grower, we don't raise them to put them on  
21 the ground. That's not our intent. We raise  
22 all our cherries to harvest for sale.

1                   Now, we also realize we want to  
2                   make money. So in the long run if you have a  
3                   huge crop, there comes the diversion. And if  
4                   you have diversion credits that are now with  
5                   a little more money, the processor will offer  
6                   you more money to divert them, which is  
7                   basically on the ground, and pay us so much a  
8                   pound to do that. And it would be more in our  
9                   favor to do that.

10                  Q        It's been asked, mentioned before,  
11                   is this going to be like a first-line issue or  
12                   a back-up issue, using diversion, is it  
13                   something that's going to be used as a first  
14                   thing that you do or is it going to be  
15                   something that --

16                  A        Well, I guess it depends on the  
17                   crop, you know. As I say, or first thing we  
18                   want to do is harvest them all, that's why we  
19                   raise them. So it'll depend on the crop, it  
20                   depends on the supply, what's the carry in,  
21                   what's the formula and what's the diversion  
22                   percentage. They're all intertwined together.



1 a disadvantage because the, we're one of the  
2 first. So if the preliminary diversion  
3 number, let's say it's 30 percent, and in  
4 September it goes to 35 or 40, the boys, as  
5 you go, as I say, as you go to Midwest or  
6 Traverse City, they can see the crop whether  
7 it's larger or not. Being the first ones in  
8 we have to make our decisions right away based  
9 on what we have right now, the information we  
10 have right now.

11 So I don't know if, it is a  
12 disadvantage being where I live.

13 Q Will the fact that either concern,  
14 I'll use the term bottom line credits, help  
15 you guys make decisions about whether to do  
16 that or not?

17 A Well, basically it's going to fall  
18 back on your processor, who you are, who he  
19 is, what his crops are and what he wants done  
20 to his plant. So a lot of times we have a lot  
21 of processors in the north who want to get  
22 started early so there's a pressure on us to

1 harvest them all so that they can start their  
2 plants early, and therefore they will make  
3 separate deals maybe with the guys from the  
4 south to harvest them all so they can, they  
5 can stretch their pack time, which as you know  
6 would lower their price, or their costs.

7 Q There have been a couple of  
8 observations made to me that we might have a  
9 situation where we short market opportunities  
10 by dropping fruit in a big year, and the not  
11 having any carryover to the next year. What  
12 are your thoughts about that?

13 A Well, basically we want to make  
14 money. That's why we're in business. And the  
15 growers realize that if we have too many, the  
16 price will be low. So this, with this  
17 situation, if we can have grower diversion  
18 certificates the same, that will increase our  
19 bottom line because the processors aren't  
20 going to pay us more if they think it's better  
21 to put them in storage. They're realizing if  
22 they put them in storage like we did in '09

1 with the big crop, it costs them storage and  
2 interest for a year, year and a half. And  
3 they don't want to incur that cross either  
4 unless there's a good idea they can market  
5 them.

6 Q Have you guys done, you, yourself  
7 done much diversion?

8 A Very little. I might do a younger  
9 box when I don't want to shake them, because  
10 it does injure the tree. But basically I  
11 shake most of my crop.

12 Q And is, that's likely to be, again  
13 be driven by what crop sizes are and what your  
14 handler --

15 A Right. As I say, we're kind of  
16 unique in the southwest being that, being  
17 first, it gives me a disadvantage but also an  
18 advantage because a lot of times a package  
19 will come down and want to get started and  
20 make sure they get their fill, because you  
21 know, if we have a big storm, we could lose  
22 the crop. So they all come down, want to

1 start down there and get what they can and  
2 move up. And if they get to the north when  
3 they've got all they want, they'll cut them  
4 off.

5 Q That's all I have. Thank you,  
6 Randy.

7 JUDGE CLIFTON: Who else has  
8 questions for Mr. Willmeng?

9 EXAMINATION

10 BY MR. ENGELER:

11 Q I just have one at the moment.  
12 You mentioned that you don't, in the past you  
13 haven't participated in the orchard or Grower  
14 Diversion Program yourself, but if this  
15 proposal were implemented do you think that  
16 would change?

17 A Well, as I say, it's going to be  
18 market grid, but I think it will be  
19 advantageous to the grower being that the  
20 diversion certificate should be worth more  
21 money. And it's like last year we had crops  
22 where we had a real bad windstorm. And some

1 of the guys had to divert their whole crops  
2 because they couldn't find a home for it.  
3 Well, they were lower than what I thought they  
4 should have had, I think with this program  
5 they would have been higher.

6 But as I say, we're unique in the  
7 south that there's not a lot of diversion  
8 going on down there except if the crop's  
9 damaged or if it's a huge crop.

10 Q So that's not unique to your  
11 individual operation, it's based on where  
12 you're located --

13 A Yes. Because we start first,  
14 yeah.

15 Q Thanks. That's all I have.

16 JUDGE CLIFTON: Who else has  
17 questions for Mr. Willmeng? Mr. Johnson?

18 EXAMINATION

19 BY MR. JOHNSON:

20 Q I'm ready. I just want to ask  
21 you, do you see any potential down side if  
22 this proposal was adopted?

1           A       No. I think it's nothing but a  
2 win, win for the industry and the growers. As  
3 you know, it's very confusing the way we do it  
4 now, when you have to, as we call it bulk off  
5 the number. And a lot of guys still have  
6 trouble with that. And I think this would be  
7 very simple, very easy to use and a win, win  
8 for us.

9           Q       Thanks.

10                   JUDGE CLIFTON: Who else has  
11 questions for Mr. Willmeng? Mr. Engeler?

12                               EXAMINATION

13           BY MR. ENGELER:

14           Q       I just have one that I've been  
15 thinking about as we've been going through  
16 this hearing up to this point, but if this  
17 proposal's implemented at the restricted  
18 percentage, when final percentages are  
19 calculated, restricted percentage would be  
20 higher. And I was wondering if that in  
21 itself, having a higher restricted percentage  
22 is, what kind of impact that could have on the

1 grower return.

2           A       Well, yeah, I understand your  
3 question. You know, I'm not sure if it will  
4 have an impact. I don't think it'll have an  
5 impact. And what normally happens is if you  
6 carry too much fruit over, it comes in on a  
7 carry in to next year which will force the  
8 percentage up. And so if it forces a  
9 percentage up then next year you may leave  
10 more fruit in the ground that year. So for a  
11 year it might affect it but I really think in  
12 the end it'll be fine. I don't think it will  
13 have any problem with that.

14           Q       In the longer term if this  
15 proposal's implemented, I guess in the  
16 immediate year I guess it would be, what would  
17 be the impact on the reserve inventory if it  
18 were implemented? Would that decrease?

19           A       This year if it was?

20           Q       Yes.

21           A       I think it, well, number one it  
22 basically would be according to the crop. I

1 mean, right now we're looking at potential for  
2 a huge crop again. And we have a good carry  
3 on, we're going through good sales this year,  
4 but we also have a big carry on coming in. So  
5 I think you'll see more cherries on the ground  
6 if this was implemented this year. I wish the  
7 judge could just go yeah, let's do it and be  
8 done, but I know she can't.

9 JUDGE CLIFTON: I'd love to rule  
10 from the bench but.

11 THE WITNESS: Yeah, I just hope,  
12 yeah, if you had a gavel and say okay, we're  
13 going to do it this year, it would be a good  
14 thing. But I understand and I'm hoping for  
15 next year.

16 JUDGE CLIFTON: Mr. Hedin?

17 EXAMINATION

18 BY MR. HEDIN:

19 Q Randy, I know you sit on the board  
20 at Coloma Frozen Foods, and Coloma's been very  
21 aggressively developing the juice concentrate  
22 markets. Do you anticipate this would affect

1 those opportunities that you guys have been  
2 developing?

3 A No, I really don't. Well, as you  
4 know, because of the way we do new market, we  
5 do have diversion credits which encourages us  
6 to bring more in because of that. So I don't,  
7 I don't see this being nothing but a win,  
8 because if we did divert, I do believe it  
9 would get more money for them.

10 Q And if you, we've had some  
11 discussions about quality and all of that, are  
12 your opportunities, given a strong focus on  
13 juice, better with your poorer quality fruit?  
14 And would that cause you to think about doing  
15 less orchard diversion, just you, send that in  
16 for juicing.-

17 A Well, it could, it could, yeah.  
18 Yeah, it could.

19 Q But it won't harm that opportunity  
20 that you guys are working on?

21 A No, no, there's no problem.

22 Q Thank you.

1 JUDGE CLIFTON: Are there any  
2 other questions for Mr. Willmeng? Mr.  
3 Willmeng, can you think of anything you'd like  
4 to add?

5 THE WITNESS: No, I think we've  
6 covered it, you know, pretty much. I think  
7 it's, as I say, I appreciate the chance to  
8 express my view.

9 JUDGE CLIFTON: We're glad you  
10 did. Thank you, you may step down.

11 THE WITNESS: Thank you.

12 JUDGE CLIFTON: Mr. Willmeng, I  
13 don't know whether you signed in on that sheet  
14 that's on the chair behind you there. You  
15 don't have to use your signature if your  
16 printing is more legible.

17 And Mr. Hill, you may call your  
18 next witness.

19 MR. HILL: That will be Perry  
20 Hedin.

21 JUDGE CLIFTON: All right. Mr.  
22 Hedin, do you want to stay where you are?

1 MR. HEDIN: Whatever you'd like to  
2 do. It may be a little easier for everybody  
3 else if they're, I've got, I've got those foam  
4 boards so it's probably better up there.

5 JUDGE CLIFTON: Okay, great.

6 MR. HEDIN: I'm not sure we'll get  
7 to them today, but.

8 JUDGE CLIFTON: Let's go off the  
9 record just a moment.

10 (Off the record.)

11 JUDGE CLIFTON: We're back on  
12 record at 2:58. I've already sworn you in,  
13 but would you again state and spell your name?

14 THE WITNESS: Certainly. My name  
15 is Perry, P-e-r-r-y, Hedin, H-e-d-i-n. I'm  
16 the Executive Director of the Cherry Industry  
17 Administrative Board and have been so since  
18 its inception.

19 JUDGE CLIFTON: And Mr. Hedin, has  
20 everything that you have provided by way of  
21 information thus far been the truth?

22 THE WITNESS: Yes.

1 JUDGE CLIFTON: You may proceed,  
2 Mr. Hill.

3 (Whereupon Exhibit Numbers 13 and  
4 14 were marked for  
5 identification.)

6 EXAMINATION

7 BY MR. HILL:

8 Q Mr. Hedin, we've marked three  
9 documents, 13, 14 and 15. Number 13 being a  
10 document from September 22nd, 2010, number 14  
11 being a document, letter from November 24th,  
12 2010 and number 15 being the testimony that  
13 you're about to give. Can you tell us about  
14 13, 14 and again, comments about numbers 13  
15 and 14 before you start your testimony?

16 A Certainly. These are the  
17 documents that we sent to the Secretary of  
18 Agriculture, I sent on behalf of the CIAB  
19 following the lengthy discussions we had in  
20 putting this, in formulating this request. So  
21 I wanted to make sure that it was in the  
22 record as well so that if reference is

1 necessary that it be there.

2 Q So you just memorialized,  
3 basically, your understanding of what you  
4 wanted to happen in the future?

5 A Correct. And then number 14 is  
6 the follow up to Mr. Engeler and Ms. Salehi  
7 for the formalization of the process once we  
8 got through the details of what was going to  
9 be done and how it was going to be crafted.  
10 And again, just to document and have it on the  
11 record.

12 Q And all of these documents were  
13 sent by you?

14 A Yes, prepared and sent by me.

15 Q Okay. And you also have some  
16 testimony. You can start whenever you're  
17 ready.

18 A Okay. Before we jump into the  
19 written testimony, I contacted my office to  
20 get some information that Ms. Salehi asked  
21 earlier. In the year 2009 we had 662 growers  
22 across the United States who either delivered

1 or processed, or they were charged for  
2 processing or diverted them. We have fewer  
3 growers than that. There were 576 growers  
4 when we eliminate duplicate addresses for some  
5 of those growers. For example, when Mr.  
6 Peterson spoke earlier he said that he has a  
7 number of clients for whom he works. If we  
8 eliminate all of those individual ones, it  
9 comes down to 576 for the industry.

10 JUDGE CLIFTON: I'm sorry. You  
11 stated a year and I didn't get it written  
12 down.

13 THE WITNESS: 2009.

14 JUDGE CLIFTON: 2009.

15 THE WITNESS: The last crop year.

16 JUDGE CLIFTON: Go ahead.

17 THE WITNESS: And then there were  
18 43 handlers of record.

19 JUDGE CLIFTON: Also 2009?

20 THE WITNESS: Yes. But as I, I  
21 want to say, I should confirm with Heather  
22 because I think that that was supposed to be

1 2010, so I can confirm that. But Ken, when  
2 she sent you the labels recently, it was for  
3 the 2010 season, wasn't it?

4 MR. JOHNSON: Yeah.

5 THE WITNESS: So it is 2010 not  
6 2009, forgive me.

7 BY MR. HILL:

8 Q For just the handlers?

9 A For both handlers and growers.

10 Q Oh.

11 A I mis-spoke. And then going with  
12 the testimony, and I will read that into the  
13 record, the Cherry Industry Administrative  
14 Board or CIAB, is a federal marketing order  
15 for tart cherries produced in various states  
16 across the country. It applies to a  
17 production of tart cherries in the states of  
18 Michigan, New York, Oregon, Pennsylvania,  
19 Utah, Washington and Wisconsin. It's  
20 authorized under 7CFR930 et. cet. If I can  
21 interject, for those who aren't as familiar  
22 with the order, there are three districts

1 within the state of Michigan. They're  
2 delineated as Northwest Michigan, West Central  
3 Michigan and Southwest Michigan. So there are  
4 nine districts in seven states.

5           Going back to the prepared  
6 testimony, the order was created in 1996 at  
7 the request of the industry, and implemented  
8 by order of the USDA. First year of operation  
9 the order was crop year 1997, and it has  
10 operated every season thereafter, hereto and  
11 including crop year 2010.

12           The ultimate purpose of the CIAB,  
13 like all other marketing orders, is to improve  
14 grower returns. It accomplishes this end by  
15 seeking to improve the environment for the  
16 production, processing and sale of tart  
17 cherries in both the domestic and  
18 international marketplaces.

19           Principal mechanisms utilized in  
20 the order to reach the desired outcomes are  
21 one, control the supply of cherries moving  
22 through the "free" market and two, the funding

1 of market promotion activities. Regulated  
2 entities under the marketing order are  
3 processors of tart cherries, also known as  
4 handlers. Growers are not directly regulated  
5 under the marketing order, but they can and do  
6 participate in the compliance aspects of the  
7 order by undertaking in-orchard diversion  
8 activity.

9 Marketing order has gone through a  
10 number of amendments to make it fit better  
11 with the needs of the industry. The present  
12 amendment is intended to do the same. Current  
13 amendment seeks to change the way in which  
14 account is made for grower in orchard  
15 diversion activities, and the manner in which  
16 grower diversion certificates are used within  
17 the industry.

18 To accomplish this change it is  
19 necessary to amend and alter what is  
20 considered to be "handing" under section  
21 930.10 with tart cherries under the order, and  
22 to define how the diverted cherries are

1 incorporated into the optimum supply formula,  
2 also referred to as the OSF, which is  
3 described in section 930.50.

4 The grower in-orchard diversion  
5 process has not worked as well or as  
6 effectively as it should in dealing with the  
7 surplus production. The current marketing  
8 order effectively discourages in-orchard  
9 diversions, especially in those years when the  
10 restriction percentage is large and/or  
11 increases from the preliminary calculation.

12 This aspect in the order needs to  
13 be structured to better serve the needs of the  
14 tart cherry industry. The way to accomplish  
15 this is to redefine what included in the term  
16 handle, which in turn will impact the  
17 operation, the optimum supply formula and  
18 permit "bottom line" in-orchard diversion,  
19 ie., in-orchard diversion credits that  
20 handlers can use pound for pound against  
21 restriction obligations.

22 Under the order, growers have a

1 right and the opportunity to undertake in-  
2 orchard diversion of cherries under section  
3 930.58. These diversions are done during  
4 harvest in accordance with procedures  
5 delineated under the order, and they're  
6 overseen by the CIAB. If these orchard  
7 diversions are done properly, the CIAB issues  
8 "grower diversion certificates" to the growers  
9 that represent the pounds of cherries that  
10 were left in the orchard. Tom Facer described  
11 some of the processes by which that happens.

12 Section 10 of the order, handle,  
13 growers themselves do not use their  
14 certificates, rather grower diversion  
15 certificates are used by handlers as one of  
16 their compliance alternatives. However, in  
17 the current construct of the order, handlers  
18 must include the pounds of cherries  
19 represented by the certificates as part of  
20 their "handling" as though these cherries had  
21 been delivered and processed.

22 Under the order as currently

1       crafted, grower diversion certificates are  
2       treated as though they were harvested and  
3       delivered for processing. I won't quote the  
4       order itself except to note that it says,  
5       handle includes obtaining grower certificates  
6       issued pursuant to Section 930.58. The fact  
7       that grower diversions are considered part of  
8       a handler's handle, creates confusion and  
9       difficulty for both growers and handlers.

10               Grower diversion certificates  
11       contribute to the supply in the restricted  
12       districts for purposes of the optimum supply  
13       formula, consequently grower in-orchard  
14       diversions effectively increase the supply of  
15       restricted shares in any given year, even  
16       though none of these cherries were delivered  
17       for processing.

18               Optimum supply formula, section  
19       930.50, the OSF is a mechanism by which the  
20       supplies of tart cherries and the demand for  
21       them are brought into proper relationship with  
22       each other. When the supply of tart cherries

1 available for the marketplace exceed the  
2 average demand for them in the "free" market,  
3 the crop is restricted regarding what may move  
4 into the free market.

5 A restriction percentage is  
6 calculated pursuant to the formula, and each  
7 handlers' handle of restricted cherries is  
8 subject to that percentage. As a side note,  
9 please recognize that there are some districts  
10 that are not restricted, and those are Oregon  
11 and Pennsylvania as a general rule. And in  
12 some years as happened in the last season,  
13 districts that produce less than one-half of  
14 their average are also unrestricted. So the  
15 restriction is only applied to the production  
16 in those districts where they've met their  
17 restriction threshold for the year.

18 The interaction of sections 930.10  
19 and 930.50 establish that grower in-orchard  
20 diversions will be subject to and then  
21 discounted by the restriction percentage  
22 calculated for the year. Therefore, when the

1 handler utilizes the grower diversion  
2 certificates it receives from growers, the  
3 certificates will have a reduced worth as a  
4 compliance tool. I've footnoted and I'm  
5 making a distinction between the term worth  
6 and the term value, worth meaning their use as  
7 a compliance tool, value is intended to  
8 reference dollar value.

9 I have prepared an example of this  
10 impact, it's called table one. On the left-  
11 hand portion of assumed handler at 10,000  
12 pounds of restriction. There is a, or 10,000  
13 pounds of production, excuse me, there's a  
14 restriction of 25 percent and on the right  
15 side I calculated out the degree of  
16 restriction by the source, so with cherries  
17 for processing at 9,000 pounds at 25 percent,  
18 2,250 of those delivered cherries are subject  
19 to restriction. And if they take in grower  
20 certificates of 1,000 pounds, that too is  
21 subject to restriction of 250. So the net, or  
22 the gross of those two is 2,500 pounds of

1 restriction on the 10,000 pound handle.

2           Consequently they were also going  
3 to have a free inventory component of 7,500  
4 and a total restricted inventory of 2,500.  
5 And to the right of that table one, I've  
6 calculated net grower certificates to be used  
7 against other restrictions. Of the 1,000  
8 pounds that they delivered, 250 have to be  
9 used against their obligation created by that  
10 certificate, so they have 750 left to apply  
11 against other restriction obligations.

12           I'm going to move down to the  
13 paragraph starting with the discounting. It  
14 says the discounting of the grower diversion  
15 certificates is certainly a problem. The  
16 issues is compounded by the fact that the  
17 restriction percentage will end by definition,  
18 will be definition, excuse me, change during  
19 the crop year. In June the preliminary  
20 percentages are calculated using the  
21 industry's best estimate of cherry production.  
22 In September the percentages are adjusted to

1 reflect actual production, both delivered and  
2 diverted, for the season.

3           The estimate of production and the  
4 actual production will never be the same.  
5 Therefore and by definition the restriction  
6 percentage will change during the course of  
7 the season. It could go either up or down,  
8 depending upon the nature of the harvest. And  
9 again, as a side note it tends to go up rather  
10 than down because we tend to underestimate the  
11 crop.

12           If the actual production is less  
13 than the estimate, the restriction percentage  
14 will decline. Either way the changing  
15 restriction percentage will impact the worth  
16 of in-orchard diversion certificates to the  
17 handler between the time they are undertaken  
18 by growers and the time they're incorporated  
19 in the handler's compliance plan.

20           As Randy was saying, that early in  
21 the harvest season, they're harvesting often  
22 by the fourth of July, at which time no one

1 knows what the final restriction is going to  
2 be, a handler, however, submits its compliance  
3 plan to me in November. So they can be taking  
4 certificates in in June, July, August and not  
5 incorporate them into their plan until  
6 November.

7           Assuming, going back to the  
8 testimony for discussion purposes, that the  
9 restriction percentage increases between June  
10 and September, there will be a decline in the  
11 worth of the in-orchard certificates. In the  
12 example set out in the table below, we've  
13 assumed that the restriction percentage  
14 increased from 25 to 50 percent.

15           As can be seen, the volume of  
16 diversion certificates available to offset  
17 other handler diversion requirements,  
18 increased accordingly. The net grower  
19 certificates declined by 250 pounds or one-  
20 third of their original compliance worth to  
21 the handler. It is this decrease in worth of  
22 those diversion certificates that presents

1 such a difficulty for both growers and  
2 handlers in undertaking and utilizing in-  
3 orchard diversion activities and grower  
4 diversion certificate compliance with crop  
5 restrictions mandated by the order.

6 The table two on page four is  
7 similar to the one set out in table one,  
8 except that I do have a 50 percent  
9 restriction. To the right we talk about the  
10 restriction by source, it's gone from 2,500 to  
11 5,000, of which the grower diversion  
12 certificates have now 500 pounds of  
13 restriction applied to them instead of 250,  
14 and the net grower certificates for other uses  
15 has declined to 50, or 500, excuse me.

16 And this is the point at which the  
17 handlers decide it's better to take that fruit  
18 in than to take certificates, because it's a  
19 matter of diminishing returns at that point,  
20 anything above 50 percent restriction. In an  
21 example, the compliance worth of those grower  
22 certificates is reduced in value solely

1 because the restriction percentage has  
2 increased.

3 This fluctuation of the  
4 restriction percentage and its impact upon  
5 grower diversion certificates creates  
6 considerable uncertainty within the industry,  
7 and nobody likes uncertainty. Neither  
8 handlers nor growers know what will be the  
9 worth of the grower diversion certificates.  
10 Growers who harvest early in the season in  
11 accordance with what they believe to be  
12 adequate diversion, may find themselves  
13 needing to supply more certificates for the  
14 fruit that they had delivered.

15 Handlers who have acquired and  
16 paid for certificates under the original set  
17 of parameters may find that their compliance  
18 plans are severely disrupted. All of this  
19 flows from the fact that grower diversions are  
20 part of the supply in the OSF and contribute  
21 to restriction determination.

22 In some years the restriction

1 percentage becomes so large that it provides  
2 a very strong disincentive to undertake in-  
3 orchard diversion activities all together. It  
4 becomes a matter of diminishing return to  
5 accept in-orchard diversion credits as a  
6 compliance tool. In such cases handlers are  
7 often more inclined to receive fruit, process  
8 it, and either hold it in inventory reserves  
9 or otherwise divert it through another option  
10 available to handlers.

11 While this alternative may not  
12 make economic sense from the grower's  
13 perspective, it may make sense from a  
14 handler's compliance perspective. Regardless  
15 of the perspective, this outcome suggests that  
16 the marketing order does not operate as  
17 effectively as it should, and this is  
18 especially so when restrictions become large.

19 Historical perspectives of in-  
20 orchard diversion activities. Grower in-  
21 orchard diversion activities varies quite a  
22 bit by year. There are various factors that

1 contribute to making decisions about whether  
2 or not to divert cherries in the orchard in  
3 any given year. The size of the crop is a  
4 very significant factor in this decision, but  
5 other factors include carryover, inventory  
6 reserves, the size of the previous year's  
7 crop, handlers plans for complying with  
8 restrictions and/or handlers prospects for  
9 sales of products in the upcoming year also  
10 are factors in the grower's decision about  
11 whether or not to divert cherries in the  
12 orchard.

13           Then I put forth on table three  
14 the degree of orchard diversion activity  
15 sorted by year, and the pounds of restricted  
16 crop for that year, the percent that those  
17 orchard diversions are of the total restricted  
18 crop, and then for informational purposes both  
19 the preliminary and final percentages for the  
20 respective years.

21           Table four is the same information  
22 but sorted by the restricted pounds. And as

1 a number of the witnesses have already talked  
2 about, we tend to see increased restriction  
3 volume as the crop gets larger. In 2009 we  
4 had a 338 million pound crop with 37.75  
5 million diverted. In 2001, which was also a  
6 very large crop, there were 336 million pounds  
7 and almost 61 million pounds of in-orchard  
8 diversion.

9 On page seven is a graph of table  
10 four, and if you look at that graph it can be  
11 seen and stated that the general trend for in-  
12 orchard diversions is for there to be greater  
13 volume of in-orchard diversion activity as the  
14 crop size increases. In those years when  
15 there's a smaller crop there's less diversion,  
16 in those years when there's a larger crop  
17 there's greater diversion. Often time both  
18 handler's processing capacity and the poorer  
19 quality of cherries associated with larger  
20 crop drives the in-orchard diversion  
21 decisions.

22 A regression analysis performed on

1 the information indicates that there is, in  
2 fact, a demonstrable correlation between the  
3 two, and r-squared value of this relationship  
4 is .622 and the t-stat is a positive 4.26,  
5 that's in Exhibit A of my testimony. And  
6 Mark, I hope you will not be too aggressive  
7 with me about analyzing key stats and the  
8 like.

9           It must be noted, however, that  
10 are were instances when the in-orchard  
11 diversion activity in any given year does not  
12 comport with the general trend. This suggests  
13 that growing diversion decisions are not  
14 premised upon crop size alone, but rather  
15 incorporate other factors as well.

16           In-orchard diversion activity must  
17 also be viewed in light of the alternative  
18 compliance options available to handlers. It  
19 is the handlers, as has been said many times  
20 here today, who are regulated under the order,  
21 and it is they who must comply with  
22 restriction obligations. Each handler will

1 craft a compliance plan that is appropriate  
2 for its business model, and it will utilize  
3 the most appropriate tools for its situation.

4 The default position in dealing  
5 with restrictions for any given year is  
6 placing the restrictive product into inventory  
7 reserves, which could be either primary or  
8 secondary reserves, depending on the  
9 circumstances. In lieu of maintaining  
10 inventory reserves, handlers may earn post  
11 harvest diversion credits for their finished  
12 goods that are moved into export markets, into  
13 expansion markets, as new products, as  
14 charitable contributions, or as destroyed  
15 products.

16 In addition to these post harvest  
17 options, handlers can use growers' in-orchard  
18 diversion credits to meet their restrictions.  
19 And again, as a number have said, it is the  
20 choice of last resort as a general rule.

21 From the following table we've  
22 seen that post harvest diversion options have

1       been of considerable worth to handlers. In  
2       the early years of the order, export markets  
3       were a major outlet for restricted cherries.  
4       The importance of this category has lessened  
5       in more recent years, but it still occupies an  
6       important position within the industry.

7               It will also be noted that  
8       secondary market activities, noted in the  
9       table as "market expand" in the table have  
10      become very significant as compliance options  
11      for handlers. Utilization of in-orchard  
12      diversions has fluctuated considerably during  
13      the years of operation of the marketing order.

14             The interest of handlers and the  
15      alternative compliance options is certainly  
16      understandable. Selling products generates  
17      revenue for the handlers, buying in-orchard  
18      diversion credits is a cost. Post harvest  
19      diversion activities support and develop  
20      markets, having fruit diverted in the orchard  
21      precludes those cherries from being marketed.

22             Processing cherries rather than

1 having them diverted in the orchard reduces  
2 unit operating costs for the handler, as noted  
3 above in-orchard diversion credits present a  
4 risk to handlers, post harvest diversion  
5 credits present no risk since they are fixed,  
6 known and will not change in worth as a  
7 compliance tool.

8 All of these elements serve to  
9 lessen the attractiveness of in-orchard  
10 diversion credits to handlers. There is  
11 potential risk associated with receiving,  
12 processing and storing cherries, and relying  
13 upon the alternative compliance tools to deal  
14 with restriction.

15 The cherries will remain in  
16 inventory reserves until handlers' compliance  
17 plans are fulfilled. If handlers engage in  
18 post harvest diversion activities without much  
19 delay, then the decision to receive and  
20 process cherries will be a good one, both for  
21 handlers and growers.

22 On the other hand, if the handlers

1 are unable to earn post-harvest diversion  
2 credits in a timely manner, then the cherries  
3 harvested, processed and stored in inventory  
4 become a burden of the handlers to the growers  
5 and to the industry, in the form of carryover  
6 inventory.

7           Unfortunately too often such  
8 cherries become reserve inventory rather than  
9 revenue generating sales, which serves to  
10 reduce returns to growers. The proposed  
11 amendment and how it will operate has  
12 mentioned, well the gist of the amendment is  
13 the redefining of the term handle, so that it  
14 does not include grower-diverted cherries.

15           With this change the OSF operates  
16 just as it has traditionally, but it does so  
17 with a smaller production base than it  
18 previously used. Those cherries diverted in  
19 the orchards are not subject to restriction as  
20 they were before, and handlers may use those  
21 certificates generated by this activity, pound  
22 for pound against their restriction

1 obligations, in the same manner as they  
2 currently do with their post-harvest diversion  
3 credits.

4 In other words, grower diversion  
5 certificates will not be discounted as they  
6 currently are. This change eliminates this  
7 incentive for orchard diversions currently  
8 present in the marketing order and it will  
9 result in a more tenable outcome for growers  
10 and handlers.

11 The process of how the change  
12 works is somewhat technical, if not very  
13 technical, and it will be discussed at length  
14 using an example to demonstrate the change.  
15 The example is titled, bottom line in-orchard  
16 diversion credits, their impact upon OSF  
17 restriction compliance, is attached to this  
18 testimony as Exhibit B and incorporates, and  
19 I incorporated by reference.

20 I don't know what the best place  
21 for this to be seen is. Can that be seen well  
22 enough?

1 JUDGE CLIFTON: He won't be near a  
2 mic if he is standing next to it pointing at  
3 things, is that your plan?

4 THE WITNESS: Yeah.

5 JUDGE CLIFTON: So, I'd rather  
6 have him with the mic in front of him. Oh,  
7 portable mic. Or tape recorder, yes. Let's  
8 do bring it closer to the people who will help  
9 you write the brief. That looks like it's not  
10 --

11 THE WITNESS: You're not going to  
12 be able to see it though.

13 JUDGE CLIFTON: That's okay. I'll  
14 come around, but I'm concerned that it's not  
15 on there stably. There, I guess that was it.  
16 Okay, I'm going to come around so that I can  
17 see as well.

18 MR. ENGELER: I have a quick  
19 question. I'm wondering if there's a smaller  
20 -- somewhere.

21 JUDGE CLIFTON: Do we have it in  
22 the materials what you have on your --

1 THE WITNESS: The equivalent is  
2 attached as Exhibit B.

3 JUDGE CLIFTON: Great. Good  
4 question, Mr. Engeler --

5 MR. ENGELER: Oh, I don't have a  
6 page one of one, that's why I don't --

7 JUDGE CLIFTON: Exhibit B, page  
8 one of one?

9 THE WITNESS: In this we're  
10 predicting a crop of 300 million pounds, and  
11 notwithstanding the fact that I said that it  
12 will never be the same, for this discussion  
13 I'm going to assume that the harvest and the  
14 estimate were in fact the same, at 300 million  
15 pounds.

16 I would assume the in-orchard  
17 diversion activities of 30 million pounds, as  
18 you can see here, and that that is a constant,  
19 unlike Tom who says it went from, I'm just  
20 assuming a fixed number on that. The free --  
21 is 50 million pounds, and that's constant  
22 throughout, and we have a demand of 170

1 million pounds in this assumption.

2 I have three columns, this is the  
3 supply formula at it's preliminarily found in  
4 June, the OSF in its final set of numbers as  
5 we do in September, and then the third column  
6 is with the adjustment as proposed by the  
7 amendment.

8 Before going through the steps of  
9 the various formulations it must be clarified  
10 what the in-orchard diversion figure  
11 represents and how it played into the various  
12 equations. In column one the OSF operates  
13 with the estimate of production. And by,  
14 again by definition, any and all cherries that  
15 become diverted cherries are incorporated in  
16 that estimate.

17 When Randy sits down and goes out  
18 and says I've got 10 million pounds of fruit  
19 in my orchards, he's making a gross  
20 projection. We don't know in June how many  
21 cherries will be diverted, and not  
22 withstanding Tom's testimony earlier today, I

1 don't think that there's any effective way to  
2 project what our orchard diversion activity  
3 will be in June. So I think we have to assume  
4 that we would operate in the June numbers  
5 without a projection for orchard diversion  
6 activities. All we know is that there is an  
7 estimated crop in the orchards and that's how  
8 we calculate it.

9 In the second column the supply  
10 formula operates with the known figures of  
11 what happened during the harvest with  
12 diversion, the 30 million pounds here are,  
13 represent certificates that my office issued  
14 to those who did in-orchard diversion  
15 activity. It is, as represented here,  
16 included as part of the supply, so in this we  
17 have a process production, 265 million, we  
18 have a orchard diversion of 30, for a total in  
19 the restricted districts of 295 million  
20 pounds.

21 To that is added the production in  
22 unrestricted districts, Oregon and

1 Pennsylvania generally, and in some instances  
2 other districts. So, we come with a total  
3 production, both for the preliminary and the  
4 OSF final is currently constructed of 30  
5 million pounds, and to that we add the carry  
6 in of 50 million pounds.

7 MR. HILL: Perry, did you mean to  
8 say 300 million pounds? You only said 30  
9 million pounds.

10 THE WITNESS: 300. Well, 300  
11 million pounds is the supply from the  
12 restricted districts. So when we add the  
13 carry in, free carry in, the total supply for  
14 the year is 350.

15 JUDGE CLIFTON: Go ahead and  
16 finish those thoughts though with million  
17 pounds.

18 THE WITNESS: Million pounds,  
19 okay, I'm sorry.

20 JUDGE CLIFTON: Just so that --

21 THE WITNESS: We can do that.

22 Column three, which is the amendment

1 formulation for the supply formula, we include  
2 that which was delivered for processing on the  
3 process production side. Instead of having  
4 the 30 million pounds of orchard diversions  
5 incorporated on the supply side, it's down  
6 here in a separate line item, the orchard  
7 diversions per amendment, 30 million pounds.

8 The restricted supply in column  
9 three includes only those cherries that were  
10 delivered for processing and processed. The  
11 final restriction percentages are calculated  
12 using the tonnage actually processed, the 265  
13 plus the 5, or 270, 270 million pounds. And  
14 the result of this change in treatment of the  
15 orchard diversion cherries -- OSF calculation,  
16 this was what Tom is referring to before, is  
17 smaller than it used to be. Instead of being  
18 350 it's 320.

19 The restricted supply under the  
20 amended OSF is the volume of cherries received  
21 for processing by handlers. Looking to the  
22 elements in the OSF equation, those cherries

1 that were diverted in the orchard, 30 million  
2 pounds, will not be included in the supply  
3 component by which regulation is calculated.  
4 And this is because they're not available to  
5 move into the markets for cherries.

6 Surplus cherries, the amount of  
7 excess supply of cherries for the OSF is the  
8 volume of the cherries available to the  
9 industry in excess of the three year average.  
10 In this case three year average is 170 million  
11 pounds in all three of the calculations. So  
12 the surplus is 350 less the 170 for 180  
13 million pounds.

14 The diverted cherries are included  
15 when calculating the excess of cherries  
16 produced over the average demand because they  
17 were, in fact, produced by growers, they were  
18 really part of this original estimate that was  
19 made, and if not diverted they would have been  
20 delivered for processing. But in both the  
21 current and amended formulations, the average  
22 demand is compared to the total produced, and

1 again, as Tom was saying the amount of pounds  
2 regulated stays constant in all three  
3 formulations, or 180 million pounds.

4           Going into the restriction  
5 calculations, we then take the 180 million  
6 pounds, it's divided by the restricted number  
7 and my number's a little bit different than  
8 Tom's, but it's 61 million pounds under the  
9 order as currently constructed, and 68 percent  
10 of the, in the amended formulation.

11           JUDGE CLIFTON: Okay. Help me  
12 again, it's 68 percent of what?

13           THE WITNESS: It's this number  
14 being divided by the restricted tonnage of  
15 270.

16           JUDGE CLIFTON: This number being  
17 the surplus?

18           THE WITNESS: The surplus, yes.

19           JUDGE CLIFTON: Surplus divided by  
20 the --

21           THE WITNESS: By the production  
22 from the restricted districts or the processed

1 production from the restricted districts are  
2 270.

3 JUDGE CLIFTON: Okay.

4 THE WITNESS: So, in this case  
5 although 180 million pounds is the same  
6 restricted pounds, we're dividing by 270  
7 instead of 300, therefore the restriction  
8 percentage goes up. The supply and excess is  
9 no different.

10 Going to the second paragraph from  
11 the bottom on page 11, the restriction percent  
12 in the two formulations is different because  
13 of mathematics. While the surplus, the volume  
14 of cherries in excess of demand remains  
15 constant, the divider in the two calculations  
16 changes. Since the divider in the calculation  
17 and the amended OSF is reduced by the amount  
18 of cherries diverted in the orchards, there's  
19 a mathematical increase in the calculated  
20 restriction percentage.

21 Now, at first blush, and Martin,  
22 it sort of seems that you have been addressing

1 this, it appears a congruous result, that the  
2 amendment's going to increase the degree of  
3 restriction. And why should a change in the  
4 supply formula do that? Well, I think it's  
5 premature to render that conclusion since this  
6 is only a portion of the equation. When we  
7 talk about compliance with restriction under  
8 revised supply formula, the benefits accruing  
9 to handlers with this change actually exceeds  
10 the increased restriction.

11 Market growth factor is, and I'd  
12 like to also mention, in my footnote on page  
13 12, that's footnote number 4, talks about when  
14 we talked with Ken and previously with Patty  
15 was with us, we had to look at the restricted  
16 percentage, or the gross restricted  
17 percentage. They never acknowledged the net  
18 restriction percentage or changes from that  
19 gross figure. We in the industry do in fact  
20 look at a net restriction that's created when  
21 we go through the market growth factor. So  
22 it's not just a gross restriction from the

1 industry's perspective, it's the net  
2 restriction that is really driving how we  
3 proceed. Market growth factor is a  
4 provision of the supply formula and a mandate  
5 from the USDA that cannot be altered, as Tom  
6 said in his testimony, requires that the  
7 cherry industry supply 110 percent of the  
8 average demand in the free market. We always  
9 have to do the 170, we always have to add to  
10 that that in this case, 17 million pounds on  
11 170 million. We are obligated to do that.

12 That same practice will happen  
13 when we're in, under the new formulation. We  
14 will still take the 17 million pounds and make  
15 sure that we supply the market at the 110  
16 percent, 170 plus the 17, so the net  
17 restricted number is 163 and the net  
18 percentage is restricted at 55 and 45, reduced  
19 from 61 and 39. That's how the industry deals  
20 with the supply formula. The same is going to  
21 be the case under the OSF as amended. We will  
22 make that same adjustment to get to a reduced

1 figure. So the supply formula's working  
2 precisely the same in any of the formulations.

3 Now, once those numbers are  
4 established -- can you guys see through this  
5 thing? The handlers have to deal with, that's  
6 pretty hard to see, isn't it? It's the  
7 handlers obligation to deal with that  
8 restriction, the 180 million pounds across the  
9 board here.

10 In our supposition here, when  
11 we're dealing with the preliminary numbers, we  
12 don't have any orchard diversion activity to  
13 post, but we made a couple assumptions here  
14 that the exports are about 15 million pounds,  
15 the market expansion is about 35, the market  
16 growth factor is really a way of dealing with  
17 that gross restriction, and those added  
18 together, we're assuming then that handlers  
19 are putting the excess into inventory  
20 reserves, in this case 113 million pounds.  
21 And that's how they would deal with the  
22 restriction in this preliminary formulation.

1 I've assumed the exports, the  
2 market expansion and market growth are the  
3 same across any of the three, but with the  
4 supply formula as is currently constructed,  
5 growers, or handlers would take the 30 million  
6 pounds as part of its compliance tool, the 15,  
7 the 35, and the 17, and then they would reduce  
8 the amount of fruit that goes into inventory  
9 reserves by 30 million pounds. So we go from  
10 113 to 83. That is the same with, in the  
11 amended order. Again, where we would see the  
12 difference as a result of having the orchard  
13 diversions is in reduction in the inventory  
14 reserves.

15 Earlier they talked about, a  
16 couple people referred to the primary  
17 reserves, or the reserves, we have primary and  
18 secondary, and under the terms of the order  
19 the primary reserve is maxed at 50 million  
20 pounds. So growers and handlers, or excuse  
21 me, handlers will always maximize their  
22 primary reserve, and they get a proportionate

1 interest in that. The balance is held in  
2 secondary reserves or as, or referred to as a  
3 cess pool, and in this case it's 113 million  
4 pounds.

5 Over here it's the same, you would  
6 have 50 going to the primary, we'd assume the  
7 secondary at 85. You know, the beginning of  
8 the year, 85, we'd add to that the 113 or a  
9 total of 198 in the secondary reserve or 248  
10 total. In this case you would have 85 in the  
11 secondary, these are just assumptions, but  
12 only 83 going into the additional reserves, so  
13 we would be at 168, the total 218.

14 And this is what a couple of them  
15 had previously described is that we would have  
16 a less total inventory in the industry, which  
17 should have a increasing effect on grower  
18 pricing. The perception, or the 248 million  
19 pounds of total inventory here is going to  
20 depress prices, it being 30 million less here  
21 should increase grower prices.

22 Looking at page 14 of my

1 testimony, if we assume, paragraph two, if we  
2 assume the handlers engage in other diversion  
3 options in the same fashion as they have, and  
4 that's what I was talking about here, the  
5 effect will be a reduced inventory reserves  
6 and the impact as seen most dramatically when  
7 comparing either of the compliance programs  
8 under these, to this.

9           There are significant savings that  
10 are generated as a result of this. On the  
11 grower's side as Jim Nugent said very well,  
12 harvesting costs are reduced, transportation  
13 costs are minimized, and the promotion  
14 surcharges from both the CIAB and CMI are  
15 eliminated to the grower. My calculation is  
16 that it's about seven and a half cents per  
17 pound savings if they don't do orchard  
18 diversion. From the handler's perspective,  
19 their variable costs are saved for the amount  
20 of fruit that is not processed, and the  
21 storage costs, I think it was Rich who said  
22 about three-quarters of a cent.

1                   You'll note in my footnote I've  
2                   heard anywhere from a half a cent to a penny  
3                   a pound per month. So there is a range of the  
4                   savings that would be generated from the  
5                   storage costs. A number have asked and talked  
6                   about the impact and how to utilize.

7                   As has been mentioned by many, the  
8                   decision to deliver cherries or to divert them  
9                   is going to be dependent on that dialogue that  
10                  happens between grower and processor. If the  
11                  handler encouraged the grower deliver and is  
12                  willing to pay accordingly, and I think that's  
13                  an important statement there, it's likely the  
14                  grower will, in fact, delivery those cherries.

15                  On the other hand, if the grower  
16                  feels that the expected return for delivered  
17                  cherries is likely to be inadequate, he may  
18                  divert cherries in the orchard. This same  
19                  process is going to continue under the amended  
20                  supply formula, and since the amendment of the  
21                  OSF increases the compliance work, and  
22                  consequently the dollar value of the in-

1 orchard certificates, the decisions made by  
2 growers may well be different than they were  
3 under the old formulation.

4           If we look at the history of the  
5 orchard diversion activity, it's apparent that  
6 the volume of in-orchard diversion increases  
7 the crop size in general. As others have  
8 said, in large crop years when those crops get  
9 over 300 million pounds, there undoubtedly  
10 will be significant in-orchard diversion  
11 activity as we saw in tables one and two.

12           When there's large volume of  
13 cherries to process, the supply far exceeds  
14 the demand, the industry faces capacity  
15 constraints. It's very difficult for them to  
16 move all that fruit through the facilities in  
17 a timely fashion. Grower opportunities to  
18 deliver are limited, and the quality of the  
19 cherries suffers. In these situations  
20 handlers and growers both conclude that  
21 orchard diversions are warranted.

22           The same logic will continue to

1       pertain to large crops when the proposed  
2       amendment is implemented. And in fact, grower  
3       in-orchard diversions will probably increase  
4       above the historical level in years with large  
5       crops. Under the amendments this restriction  
6       will be higher, handlers will need more  
7       compliance activities to meet their  
8       obligations and most importantly, all parties  
9       will know that the in-orchard diversion  
10      credits will be pound for pound of credits  
11      against restriction obligations.

12                 Furthermore, growers will be more  
13      inclined to divert cherries knowing that there  
14      will be a stronger demand for their  
15      certificates, and knowing that the prices paid  
16      for them, for their delivered cherries will be  
17      significantly reduced due to crop size. And  
18      I refer there to Exhibit C, which is a chart  
19      that Ray Rowley, who you'll meet, and Utah put  
20      together describing the inverse relationship  
21      between crop size and grower prices. As the  
22      crop size gets larger, the grower price

1 generally gets smaller.

2 In medium crops, when tart cherry  
3 crop is more moderate, from 225 to 300 million  
4 pounds, in-orchard diversions are generally  
5 more moderate as well. The industry does not  
6 face the same capacity constraints, growers do  
7 not face delivery quotas, and the quality of  
8 the cherries is generally better since the  
9 trees are not over-stressed.

10 Deliveries of cherries can proceed  
11 in a timely fashion as the fruit ripens. In  
12 these instances, the degree of diversion has  
13 ranged from two and a quarter percent to 6.49  
14 percent of the restricted crop. While much of  
15 the same logic will apply in medium size crop  
16 years under the amended supply formula, as  
17 have applied under the current OSF, it is  
18 likely that we'll see proportionally more  
19 diversion. The incentives to divert in the  
20 orchard will probably be greater under the  
21 amended OSF, I should say than they were under  
22 the current OSF.

1           The interplay in grower prices and  
2           diversion activities will be much more dynamic  
3           in these sized crops. Growers might elect to  
4           divert in these situations where they might  
5           otherwise have delivered under the existing  
6           OSF.

7           Handlers will continue to need  
8           compliance alternatives, with the need for  
9           these increasing as the crop size increases.  
10          Anticipated prices for delivered cherries will  
11          play an important component in the decision to  
12          deliver or divert.

13          In small crop years there tends to  
14          be very little in-orchard diversion  
15          activities, as many have said. Handlers want  
16          to protect their markets so they encourage  
17          delivery of cherries for processing. The  
18          price to deliver cherries is much higher in  
19          the short crop years than in the medium or  
20          large crop years, and the interplay of prices  
21          for delivered cherries and diversion  
22          certificates will continue to favor the

1 delivery of cherries in short years.

2           Grower prices and in-orchard  
3 diversion activity, as I said a few minutes  
4 ago grower prices tend to have an inverse  
5 relation to supplies. And again, reference  
6 Exhibit C. When there are large crops grown,  
7 delivered and processed, grower returns are  
8 lessened. By contrast, in shorter years the  
9 returns to grower tend to be increased. Given  
10 this relationship, it may be more prudent for  
11 growers to leave cherries in the orchard than  
12 to deliver them for processing.

13           Under the present constrict of the  
14 marketing order and the OSF, the impact on  
15 pricing and grower diversion activities has  
16 not been very pronounced. Under the proposed  
17 amendment of the order, this influence will  
18 increase. Should the growers engage increased  
19 in-orchard diversions, they could influence  
20 the supply of available cherries and thereby  
21 increase returns they receive. This is a  
22 principal goal of the marketing order and it

1 should be encouraged.

2           Grower returns under the marketing  
3 order, while grower returns under the  
4 marketing order are not a direct issue for  
5 this amendment, this topic is always of great  
6 interest to the industry and to the USDA in  
7 assessing the benefits of the marketing order.  
8 Reviewing information reported by NASS, USDA  
9 and its non citrus fruit and nut publications,  
10 it can be demonstrated that the marketing  
11 order has, in fact, accomplished the stated  
12 purpose of increasing grower returns.

13           In discussing grower returns,  
14 there is a tendency to speak only in terms of  
15 the grower price per pound for their cherries,  
16 and that's a constant issue that comes up for  
17 the grower community. Grower pricing has been  
18 stabilized under the marketing order, and the  
19 degree of the inverse relationship between the  
20 crop size and the grower price has, in fact,  
21 been lessened. The downward trend in pricing  
22 experience from '82 to '95 has been stopped,

1 reversed and stabilized. Again, referring to  
2 Exhibit C, these aspects are very important in  
3 valuable outcomes of the order.

4 While price per pound is  
5 important, it may be more demonstrative to  
6 look at the farm gate value as a measure of  
7 success of the marketing order. Now I had not  
8 seen Jim's presentation before this, so it may  
9 be a bit duplicative of his. The farm gate  
10 value calculates the industry's total return  
11 by multiplying the reported grower price by  
12 the pounds produced. Using this calculation,  
13 the following results are seen. And table 11  
14 goes through that.

15 And then visually if we can look  
16 at some of the graphs from my, I believe it's  
17 Exhibit D.

18 JUDGE CLIFTON: Yes.

19 THE WITNESS: You'll see that  
20 during the CIAB, which goes from 1997 through  
21 2010 on page one, this is off of the materials  
22 that Mr. McFetridge had put into the record,

1 that the average farm gate value under the  
2 marketing order is 57,214, one, two three,  
3 four of the chart on page one. Prior to that,  
4 from '82 to '96 it was \$46,699, a change of  
5 over \$10,500 and an increase of 22 « percent.

6 I then wrote down the periods of  
7 the marketing order, or the period from '82 to  
8 '86, '87 to '91, '92 to '96, '97 to 2001, 2002  
9 to '06 and '07 to 2010, showing the average  
10 production, or average value during those  
11 periods. And on the bottom right of table 11,  
12 talks about from '82 down to '96, we saw  
13 declining farm gate value, since then we've  
14 seen increasing average farm gate values.

15 Farm gate value for the tart  
16 cherry industry has climbed steadily under the  
17 umbrella of the marketing order. During this  
18 period, as I said, the decline has increased.  
19 If we can look at -- the farm gate value is on  
20 the graph, page two of four, and then on page  
21 three of four I did the five year average,  
22 rolling average prices for farm gate value,

1 and it shows a fairly steady increase in  
2 return from a farm gate perspective.

3 The proposed amendment for the  
4 bottom line credits will improve the grower  
5 return, even more it will further restrain the  
6 tendency for grower prices to trend inversely  
7 to the crop size, it will alter the  
8 supply/demand relationship of tart cherries in  
9 the marketplace, and will lead to stronger  
10 farm gate values for the growers.

11 In conclusion, the amendment of  
12 the marketing order to allow for bottom line  
13 grower in-orchard diversion credits, will  
14 improve the functioning of the marketing  
15 order, will enhance the likelihood of in-  
16 orchard diversion in those years when it is  
17 most appropriate to do so, will place growers  
18 in a more equal footing to handlers in dealing  
19 with restrictions on the crop, and will  
20 improve returns to growers.

21 It will not adversely affect the  
22 tart cherry industry in any known or

1 demonstrable manner. It is supported by the  
2 vast majority of the tart cherry industry.  
3 And adding to that, mentioning that this was,  
4 in fact, a virtually unanimous motion by the  
5 board, is an unusual fact as Ken can attest.  
6 We did have one abstention, but otherwise it  
7 was a unanimous approval by the CIAB. The  
8 proposal should therefore be implemented as  
9 requested by the industry.

10 Now, you can all wake up.

11 JUDGE CLIFTON: I don't think we  
12 can sleep, we had to keep up. Who would like  
13 to take a stretch break before we have  
14 questions of the witness?

15 MR. HILL: I will point out it's  
16 4:00 o'clock right now. We have to be out of  
17 here --

18 JUDGE CLIFTON: It will be a long  
19 stretch break, it'll be overnight. Okay. I  
20 think we should start to pack up.

21 MR. HILL: Okay.

22 JUDGE CLIFTON: All right. So

1 you'll still be on the stand first thing in  
2 the morning.

3 MR. HEDIN: We have some others  
4 coming in the morning who would like again, to  
5 get off as quickly as possible. Can I fill in  
6 after they've --

7 JUDGE CLIFTON: Certainly.

8 MR. HEDIN: Thank you.

9 JUDGE CLIFTON: I presume you all  
10 would like to begin at 9:00 in the morning?  
11 Yes, Mr. Engeler?

12 MR. ENGELER: Would it be an  
13 option to maybe start a little earlier? I  
14 know the notice didn't allow for that, or  
15 didn't --

16 JUDGE CLIFTON: Well, what time  
17 will your witnesses be here? The ones that  
18 you want to --

19 MR. HEDIN: Well I can be here at  
20 any time and can continue. I talked to Eric  
21 and his boss is maybe going to come down  
22 early. I'll put in a few phone calls and see

1 if we can get them down earlier.

2 JUDGE CLIFTON: Okay.

3 MR. HEDIN: So I don't think  
4 that's --

5 JUDGE CLIFTON: When can we get  
6 access to the courtroom?

7 COURT REPORTER: Are we off the  
8 record, your Honor?

9 JUDGE CLIFTON: No, let's stay on  
10 the record while we figure this out. This is  
11 important.

12 MR. ENGELER: Would 8:00 o'clock  
13 be acceptable for everybody?

14 JUDGE CLIFTON: Works for me. Can  
15 everybody do that? All right. We conclude  
16 for the day at 4:02 and I will see you here at  
17 8:00 a.m. ready to go.

18 (Whereupon, at 4:02 p.m., the  
19 hearing was adjourned is scheduled to resume  
20 at 8:00 a.m. on April 21, 2011.)

21  
22

<b>A</b>				
<b>abandon</b> 49:19 196:22	<b>achieving</b> 109:7	114:14,15 117:20 162:1 262:12	<b>adverse</b> 77:1 147:7 174:5 182:21 183:12 201:3,7	<b>alter</b> 229:19 273:7 <b>altered</b> 259:5 <b>alternate</b> 26:17 151:14
<b>abandoned</b> 99:6 108:1 162:10	<b>acquire</b> 54:3,18	<b>address</b> 57:15 115:18	<b>adversely</b> 201:14 273:21	<b>alternative</b> 240:11 243:17 245:15 246:13
<b>abandonment</b> 99:4 99:9 100:3 101:2 101:3 104:1 105:18 108:2,6 126:15	<b>acquired</b> 239:15	<b>addresses</b> 39:6 226:4	<b>advertising</b> 208:21	<b>alternatives</b> 155:4 155:8 231:16 268:8
<b>abbreviated</b> 33:2	<b>acre</b> 19:5,5 130:5,6 130:8,10,11,13 198:15 212:7	<b>addressing</b> 57:14 63:6 257:22	<b>affect</b> 125:13 166:14 199:21 201:15 219:11 220:22 273:21	<b>amend</b> 94:15 146:8 179:3 229:19
<b>ability</b> 43:18,21 199:8 201:15	<b>acreage</b> 22:18	<b>adds</b> 131:16	<b>affiliated</b> 208:17	<b>amended</b> 79:6,12 80:5,14,20 94:6 178:18 254:20 255:21 256:10 257:17 259:21 261:11 264:19 267:16,21
<b>able</b> 53:11 61:4 93:7 109:10 110:7 115:3 118:16 129:12 146:8 170:8 174:22 185:8 194:17 203:22 249:12	<b>acres</b> 18:7,8,8,9,14 18:15,17 49:8 208:17	<b>adequate</b> 239:12	<b>afternoon</b> 165:11 195:21 208:8	<b>amendment</b> 10:8 26:11 30:13 39:6 39:17,19,22 40:11 41:11,17 66:4,20 67:15 70:9 82:17 90:18 94:19 98:19 99:1 104:18 106:7 107:9,19 110:11 124:1 126:8 145:18,19 146:5 152:6 153:4,13 154:11 155:6 165:19 176:11 179:4 196:14 201:8 203:14 209:7,8 229:12,13 247:11,12 251:7 253:22 254:7 264:20 266:2 269:17 270:5 273:3,11
<b>abbreviated</b> 33:2	<b>Act</b> 117:15	<b>adjourned</b> 276:19	<b>AG</b> 6:20 7:20	<b>amendments</b> 17:13 18:3 54:22 56:14 56:18 57:6 63:2,5 65:14,17 66:2 67:2 76:22 77:9 78:8 80:15 146:1 147:6 151:17
<b>ability</b> 43:18,21 199:8 201:15	<b>actions</b> 91:14	<b>adjusted</b> 235:22	<b>age</b> 49:9 109:21 152:17 159:22 160:8	
<b>able</b> 53:11 61:4 93:7 109:10 110:7 115:3 118:16 129:12 146:8 170:8 174:22 185:8 194:17 203:22 249:12	<b>activities</b> 39:10 200:12,12 229:1 229:15 238:3 240:3,20,21 245:8 245:19 246:18 250:17 252:6 266:7 268:2,15 269:15	<b>adjusting</b> 129:21	<b>Agent</b> 105:12	
<b>above-captioned</b> 1:15	<b>activity</b> 32:7 51:19 78:10,12,13,14 153:22 154:2,10 229:8 241:14 242:13 243:11,16 247:21 252:2,15 260:12 265:5,11 269:3	<b>adjustment</b> 251:6 259:22	<b>aggressive</b> 243:6 <b>aggressively</b> 220:21	
<b>absolutely</b> 54:20,20	<b>ADMIN</b> 11:3	<b>ADMIN</b> 11:3	<b>aggressively</b> 220:21	
<b>abstention</b> 66:16 274:6	<b>administer</b> 17:3	<b>Administration</b> 6:7 6:12,22 16:18 63:20 76:7,20 146:20 147:5 181:19	<b>AgiCom</b> 116:11,12	
<b>accept</b> 36:7 152:1 240:5	<b>Administration</b> 6:7 6:12,22 16:18 63:20 76:7,20 146:20 147:5 181:19	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>ago</b> 58:11 114:11 117:17 269:4	
<b>acceptable</b> 276:13	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>admissible</b> 4:18	<b>agree</b> 119:6 163:5 178:10 184:8 201:18	
<b>access</b> 105:11 167:20 276:6	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>agreement</b> 31:1	
<b>accomplish</b> 204:1 229:18 230:14	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>agricultural</b> 6:5 7:4 98:12 110:22 111:4 144:16 181:21 182:19	
<b>accomplished</b> 270:11	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>agriculture</b> 1:1,1 5:2,3,16,17 16:17 16:22 17:8,10,17 76:9,21 143:3 224:18	
<b>accomplishes</b> 228:14	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>Agriculture's</b> 8:7	
<b>account</b> 80:16 173:7,16 229:14	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>ahead</b> 83:17 226:16 253:15	
<b>accounted</b> 27:6 44:19 45:3 56:19	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>aid</b> 41:12	
<b>accruing</b> 258:8	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>allow</b> 41:14 273:12 275:14	
<b>accumulated</b> 156:2	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>allowed</b> 28:13,21 29:7	
<b>accumulating</b> 153:8 156:10	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>allowing</b> 39:8	
<b>accurate</b> 54:14 68:11 139:13,13	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>allows</b> 152:7	
<b>achieve</b> 109:10	<b>admission</b> 15:10 20:8 149:7,10,14 163:21	<b>admission</b> 15:10 20:8 149:7,10,14 163:21		

161:11 178:20 179:5,6,8 182:20 198:4 199:15 209:11 229:10 266:5 <b>amendment's</b> 258:2 <b>America</b> 29:2 <b>amount</b> 38:8,13 42:5 46:15,16 50:15 53:17 55:15 59:11,12,18 60:9 60:17 65:6 84:9 88:9,10,12 90:4 92:3 93:17 95:1 113:16 125:9,21 171:2 255:6 256:1 257:17 261:8 263:19 <b>AMS-FV-10-0087</b> 1:8 5:8 <b>analysis</b> 7:21 16:21 17:2 99:10,12,20 100:10 103:6 127:12 128:12 137:8 139:17 242:22 <b>analyzed</b> 111:9 <b>analyzing</b> 18:2 116:17 243:7 <b>and/or</b> 39:13 40:12 75:18 230:10 241:8 <b>announcement</b> 4:8 <b>annual</b> 32:3 62:6 76:8,10 146:21 181:20,22 <b>annually</b> 142:6 <b>answer</b> 42:18 69:8 73:3 91:6 203:2 <b>answered</b> 177:15 202:13 <b>anticipate</b> 9:13 53:7 57:9,20 175:9 220:22 <b>anticipated</b> 30:9,20 30:20 33:4 54:8	68:22 69:14 79:18 84:6 268:10 <b>anticipating</b> 92:20 <b>anybody</b> 134:7,8 189:19 203:15 <b>anybody's</b> 144:22 <b>anyway</b> 57:19 <b>AO-370-A9</b> 1:6 5:7 <b>apologize</b> 84:5 86:13 92:14 95:10 <b>apparent</b> 265:5 <b>appearances</b> 5:9 <b>appears</b> 258:1 <b>apples</b> 196:6 209:2 <b>applied</b> 45:13 233:15 238:13 267:17 <b>applies</b> 227:16 <b>apply</b> 29:3 54:5 235:10 267:15 <b>appreciate</b> 187:1 192:12 203:7 222:7 <b>approach</b> 6:15,16 11:4 75:17,19 86:16 144:12 148:2 <b>appropriate</b> 244:1 244:3 273:17 <b>approval</b> 274:7 <b>approved</b> 67:16 70:10 <b>approximately</b> 29:16 208:16 <b>April</b> 1:10 4:4 56:6 276:20 <b>apt</b> 135:20 206:21 <b>area</b> 46:18,18 72:3 98:2 117:4 132:15 134:16 <b>areas</b> 33:20 46:20 49:15 118:11 153:7 205:21 <b>arena</b> 171:11 <b>argue</b> 30:19 40:1 77:4 <b>ascertain</b> 158:15	<b>aside</b> 61:13 <b>asked</b> 43:3 61:19 72:17 123:18 126:21 211:10 225:20 264:5 <b>asking</b> 10:3 61:14 69:5 201:5 202:19 <b>asparagus</b> 209:2 <b>aspect</b> 230:12 <b>aspects</b> 229:6 271:2 <b>assessed</b> 31:17 <b>assessing</b> 270:7 <b>assessment</b> 117:21 <b>assigned</b> 4:14 <b>associated</b> 108:2 109:18 110:2 126:15 242:19 246:11 <b>association</b> 168:6 202:1 <b>assume</b> 126:19 145:18 156:21 158:6 250:13,16 252:3 262:6 263:1 263:2 <b>assumed</b> 84:10 234:11 237:13 261:1 <b>assuming</b> 33:20 36:3 237:7 250:20 260:18 <b>assumption</b> 33:14 90:17 251:1 <b>assumptions</b> 173:13 260:13 262:11 <b>attached</b> 248:17 250:2 <b>attempts</b> 39:1 <b>attended</b> 65:13 <b>attention</b> 88:1 <b>attest</b> 142:4 274:5 <b>attorney</b> 5:14 <b>attractiveness</b> 246:9 <b>August</b> 237:4 <b>authored</b> 144:20	<b>authorized</b> 227:20 <b>authors</b> 115:9 <b>automatically</b> 73:12 <b>available</b> 27:19 34:18,19 35:3 37:19 39:18 59:19 60:7 61:9 65:10 74:1 95:4 104:4 110:21 127:17 191:11 233:1 237:16 240:10 243:18 255:4,8 269:20 <b>Avenue</b> 1:12,21 <b>average</b> 28:6 59:2 59:16 60:3 75:5 79:21,22 80:8 84:11,14 88:13 89:13,18 99:19,20 99:22 100:11,20 104:1,11 106:8,22 107:4,4,5,5 108:4 108:7 109:4 112:3 112:6,9,11,11 128:7 129:17,19 130:12,17 142:11 233:2,14 255:9,10 255:16,21 259:8 272:1,9,10,14,21 272:22 <b>averaged</b> 100:16 <b>averages</b> 177:10,11 <b>averaging</b> 112:20 <b>avoid</b> 129:12 <b>aware</b> 197:18 209:4 <b>a-n-d-y</b> 207:15 <b>a-r-y-l</b> 195:10 <b>a.m</b> 1:17 4:2 276:17,20 <hr/> <b>B</b> <hr/> <b>B</b> 65:4 248:18 250:2,7 <b>Bachelor's</b> 17:7 <b>back</b> 9:7 31:7,19 36:5 46:10 65:12	68:19,20 69:5,6 82:8,11 87:2,16 87:18 88:6 96:16 102:10,14,15 103:12,16 104:19 105:2,3,10 112:14 118:3 138:7,10 163:7 173:6 174:1 178:5 180:22 185:16 207:4,7 213:18 223:11 228:5 237:7 <b>back-up</b> 211:12 <b>bad</b> 31:3,3 127:21 171:22 178:13 180:19 186:18 216:22 <b>bagels</b> 103:15 <b>balance</b> 41:13 262:1 <b>ballpark</b> 121:4 <b>Bankruptcy</b> 1:12 <b>base</b> 58:20 59:22 60:9 175:10 247:17 <b>based</b> 28:5 68:1 76:6,19 80:14,19 81:8 140:12 146:19 147:4 181:18 182:18 197:3 199:1 200:3 213:8 217:11 <b>basically</b> 103:21 104:7 105:1 116:8 130:9 146:3 162:6 211:7 213:17 214:13 215:10 219:22 225:3 <b>basis</b> 32:3 39:9 62:6 112:9 130:5 209:22 <b>basket</b> 132:1 196:2 198:9 <b>Bay</b> 98:1 134:16 <b>bearing</b> 109:21 110:1 <b>beautifully</b> 20:13
--	--	---	--	--

<b>beginning</b> 5:12 48:16 262:7	171:18 178:14 179:4 184:1	156:21 157:1 166:3 169:6,7	125:22 132:6,14 132:16 141:3	90:6 124:2 255:15
<b>behalf</b> 2:2,14 224:18	197:13 214:20 221:13 223:4	173:2 178:17 192:19,19 200:9	161:13 184:18 221:6 249:8	<b>calculation</b> 81:1 84:3 112:7 230:11
<b>belief</b> 66:19	229:10 230:13 238:17 267:8	200:15 208:19,20 208:22 220:19	<b>bringing</b> 41:12 87:21 109:20	254:15 257:16 263:15 271:12
<b>believe</b> 54:15,21 55:2 57:7,7 79:19	<b>bid</b> 38:21	223:17 227:14 260:9 274:5	124:18	<b>calculations</b> 255:11 256:5 257:15
84:22 85:5,8 98:19 105:22	<b>big</b> 44:20 46:6 55:4 73:11,11 105:5	<b>boards</b> 223:4	<b>brings</b> 124:16	<b>California</b> 6:8
106:2 107:9,18,20 112:15 128:7	125:12 127:20,22 130:22 131:17	<b>bogged</b> 192:13	<b>broke</b> 111:15	<b>call</b> 24:12,21,22 34:15 42:10 50:14
138:14,16 140:11 140:16,19 147:14	209:17 214:10 215:1,21 220:4	<b>book</b> 129:21 142:6	<b>brought</b> 66:3 81:21 122:5 232:21	96:1,5 100:21 135:14,15 147:18
153:4 154:11 162:4 166:9 168:8	<b>bigger</b> 41:20 45:1 52:6 53:3,7 175:8	<b>booted</b> 85:14	<b>bulk</b> 218:4	147:22 163:18 169:22 180:10
170:11 177:16 183:17,20 187:8	176:2,22 210:17	<b>borrow</b> 180:6	<b>bulletin</b> 115:5	207:10 218:4 222:17
189:4 191:15 192:15 193:4,22	<b>biggest</b> 17:17 42:2 112:1 121:10,13	<b>boss</b> 275:21	<b>bumper</b> 204:13	<b>called</b> 11:15 25:19 48:15 91:1 97:3
197:20 202:14 209:14 221:8	125:19 177:9	<b>bottom</b> 41:15,22 80:4 90:3,3,22	<b>buoyancy</b> 131:17	99:4 124:21 141:17 150:15
239:11 271:16	<b>bill</b> 156:2,4,8,10 172:20,21 176:5	92:1 93:20 94:18 119:2 123:19	<b>burden</b> 28:8 73:19 73:19 107:16	165:5 195:6,15 196:2 208:1
<b>belong</b> 197:1	<b>bills</b> 153:8 187:13	125:6,7 126:1,2 132:2 151:19	172:18,18 247:4	234:10
<b>bench</b> 220:10	<b>bit</b> 33:2,17 41:5,19 42:2 43:1 44:18	152:9 153:1 160:6 166:5 167:10	<b>bushel</b> 132:1 196:2 198:9	<b>calling</b> 99:1
<b>beneficial</b> 110:12 155:6	56:13 58:15 90:10 90:19 92:8,8	168:1 169:12 170:9 172:17	<b>business</b> 17:8 32:6 76:6,7,19,21 77:1	<b>calls</b> 275:22
<b>benefit</b> 98:19 107:21 108:20	97:19 113:15 144:2 168:21	173:13 174:18 184:22 188:5	77:4,5,6 78:17,19 146:20 147:5	<b>cap</b> 159:12
137:9 166:1	175:10 193:20 195:22 208:13	213:14 214:19 230:18 248:15	181:19,20 186:1 214:14 244:2	<b>capacity</b> 8:4 74:22 242:18 265:14
<b>benefits</b> 117:5 183:14 258:8	240:22 256:7 271:9	257:11 272:11 273:4,12	<b>businesses</b> 147:7	267:6
270:7	<b>Black</b> 144:20 145:2	<b>bought</b> 36:2 56:5	<b>buy</b> 174:12,22 175:1	<b>capital</b> 187:13
<b>berrying</b> 18:7,9	<b>blended</b> 112:5,9,11	<b>bout</b> 118:18	<b>buying</b> 245:17	<b>caption</b> 4:22 5:3
<b>best</b> 9:18 31:17 32:21 82:3 91:6	<b>block</b> 49:19 50:5,8 50:9 152:20 154:4	<b>box</b> 215:9	<b>B-l-a-c-k</b> 145:2	<b>capture</b> 139:1
126:3 172:16 181:5 193:2,4	160:2,16,17 196:22	<b>boys</b> 213:4	<b>B-r-i-a-n</b> 8:6	<b>captured</b> 22:19,21
197:5 235:21 248:20	<b>blocks</b> 160:8	<b>Branch</b> 6:7,12,22 7:22 16:18,22	<hr/>	<b>career</b> 98:6,10,14 98:15
<b>better</b> 67:4,6 75:11 115:17,18 123:3	<b>blueberries</b> 209:2	23:12 63:21	<b>C</b>	<b>carried</b> 142:20 171:21 174:21
132:9 134:20 142:13 149:4	<b>blush</b> 257:21	<b>break</b> 24:18 81:15 87:13,17 139:7	<b>C</b> 266:18 269:6 271:2	<b>carry</b> 28:5 39:13 79:15,17 84:8
155:10,14 160:19 166:18 167:4	<b>board</b> 2:15 8:11,12 8:19 26:14,15,16	194:8 274:13,19	<b>calculate</b> 130:10 252:8	89:7 102:17,20 107:13,15 113:13
168:10,12,20,22 169:17 170:5	26:17 57:13,13,17 66:3,5 67:13	<b>breaks</b> 199:2	<b>calculated</b> 100:15 109:15 114:16	113:17 121:12 126:18 127:9,9,14
	74:19 114:8 151:14,15,16	<b>Brian</b> 2:17 8:3,5 94:5 165:16	233:6,22 234:15 235:6,20 254:11	127:20,22 128:3,3 128:7,14 211:20
		<b>brief</b> 249:9	255:3 257:19	219:6,7 220:2,4 253:5,13,13
		<b>briefly</b> 48:3	<b>calculates</b> 106:10 271:10	
		<b>bring</b> 99:11 119:9 123:9 124:19	<b>calculating</b> 80:20	

<b>carrying</b> 41:1 180:9	<b>certainly</b> 9:19 23:4 33:11 57:14,19 58:6,7 61:18 62:7 67:1 69:14 70:3,5 71:2 74:14 105:16 109:4,16 111:18 128:9 134:22 223:14 224:16 235:15 245:15 275:7	175:2 176:9 179:18 180:5,10 181:6	<b>check</b> 49:15 79:20 85:19 114:2 157:15 200:3	265:13,19 266:13 266:16 267:8,10 268:10,17,18,21 269:1,11,20 270:15 273:8
<b>carryover</b> 33:5,10 37:9,17 40:13 52:17,22 53:17 126:10 168:3 190:12 214:11 241:5 247:5	<b>certificate</b> 3:15,15 3:16 13:12 14:3 14:12 48:8 51:1,2 51:9 124:8 135:17 166:4 197:22 216:20 235:10 238:4	<b>cet</b> 227:20	<b>chemical</b> 70:1	<b>cherry</b> 2:14 3:18 8:10,19 15:16 17:15 19:3,7,11 19:15 26:21 27:8 27:17,18,22 30:4 33:9 38:19 39:3 45:6 76:12 98:3 98:16 103:16 104:21 114:4,5,7 116:12,13,20,22 117:1,11 118:17 131:20 132:9 142:2,7 157:1 166:2 182:2 188:13 198:16 200:14 208:14,20 208:21 223:16 227:13 230:14 235:21 259:7 267:2 272:16 273:22 274:2
<b>carry-in</b> 128:16	<b>certificates</b> 31:13 31:22 32:18 35:11 38:14 41:21 42:5 48:2 54:4,6,19 55:14,21 56:5,7 60:20 61:1,6 66:13 67:16 70:11 72:19,20,22 73:7 91:15,17,20 92:10 92:11,13 93:15 95:2,2,3 121:6,15 124:16 126:13 168:1 171:13 209:9 214:18 229:16 231:8,14 231:15,19 232:1,5 232:10 234:2,3,20 235:6,15 236:16 237:4,11,16,19,22 238:12,14,18,22 239:5,9,13,16 247:21 248:5 252:13 265:1 266:15 268:22	<b>chair</b> 222:14	<b>CHERRCO</b> 140:3	<b>cherries</b> 1:5 5:4 10:9 17:14 26:12 27:1,5 28:10 29:9 32:5 37:1 48:5,5 50:15,17 51:2 59:1,4 61:3,8,11 61:15,17 62:12 64:19 71:21 78:3 78:5 80:17,21 100:1,8 102:14 103:14 107:2 111:6,19 129:9 130:1,21 131:10 131:15,15,19 132:7 139:12 144:19 152:4 153:5 157:8,14 158:5,7 159:11 161:12 162:7 167:15,18 170:12 176:7,7,9 177:3 184:7 190:18 196:5,6 197:20 198:1,2 201:12,12 202:9 208:17 209:2 210:5,11,22 212:10 220:5 227:15,17 228:17 228:21 229:3,21 229:22 231:2,9,18 231:20 232:16,20 232:22 233:7 234:16,18 241:2 241:11 242:19 245:3,21,22 246:12,15,20 247:2,8,14,18 251:14,15,21 254:9,15,20,22 255:5,6,7,8,14,15 257:14,18 264:8 264:14,17,18
<b>case</b> 4:7,22 10:16 12:8 79:9 102:10 103:13 105:9 106:21 116:16 127:9 160:14 201:9,17 255:10 257:4 259:10,21 260:20 262:3,10	<b>certify</b> 4:15	<b>chance</b> 119:2 153:3 154:6 177:2 210:17 222:7	<b>cherries</b> 1:5 5:4 10:9 17:14 26:12 27:1,5 28:10 29:9 32:5 37:1 48:5,5 50:15,17 51:2 59:1,4 61:3,8,11 61:15,17 62:12 64:19 71:21 78:3 78:5 80:17,21 100:1,8 102:14 103:14 107:2 111:6,19 129:9 130:1,21 131:10 131:15,15,19 132:7 139:12 144:19 152:4 153:5 157:8,14 158:5,7 159:11 161:12 162:7 167:15,18 170:12 176:7,7,9 177:3 184:7 190:18 196:5,6 197:20 198:1,2 201:12,12 202:9 208:17 209:2 210:5,11,22 212:10 220:5 227:15,17 228:17 228:21 229:3,21 229:22 231:2,9,18 231:20 232:16,20 232:22 233:7 234:16,18 241:2 241:11 242:19 245:3,21,22 246:12,15,20 247:2,8,14,18 251:14,15,21 254:9,15,20,22 255:5,6,7,8,14,15 257:14,18 264:8 264:14,17,18	<b>cherry</b> 2:14 3:18 8:10,19 15:16 17:15 19:3,7,11 19:15 26:21 27:8 27:17,18,22 30:4 33:9 38:19 39:3 45:6 76:12 98:3 98:16 103:16 104:21 114:4,5,7 116:12,13,20,22 117:1,11 118:17 131:20 132:9 142:2,7 157:1 166:2 182:2 188:13 198:16 200:14 208:14,20 208:21 223:16 227:13 230:14 235:21 259:7 267:2 272:16 273:22 274:2
<b>cases</b> 36:3 41:2 50:22 200:2 240:6	<b>cess</b> 262:3	<b>chances</b> 169:21 170:6	<b>cherries</b> 1:5 5:4 10:9 17:14 26:12 27:1,5 28:10 29:9 32:5 37:1 48:5,5 50:15,17 51:2 59:1,4 61:3,8,11 61:15,17 62:12 64:19 71:21 78:3 78:5 80:17,21 100:1,8 102:14 103:14 107:2 111:6,19 129:9 130:1,21 131:10 131:15,15,19 132:7 139:12 144:19 152:4 153:5 157:8,14 158:5,7 159:11 161:12 162:7 167:15,18 170:12 176:7,7,9 177:3 184:7 190:18 196:5,6 197:20 198:1,2 201:12,12 202:9 208:17 209:2 210:5,11,22 212:10 220:5 227:15,17 228:17 228:21 229:3,21 229:22 231:2,9,18 231:20 232:16,20 232:22 233:7 234:16,18 241:2 241:11 242:19 245:3,21,22 246:12,15,20 247:2,8,14,18 251:14,15,21 254:9,15,20,22 255:5,6,7,8,14,15 257:14,18 264:8 264:14,17,18	<b>choice</b> 162:12 167:21 197:21 244:20
<b>cash</b> 106:18 107:7 109:17	<b>cesspool</b> 170:1,20 171:20 174:21	<b>change</b> 39:19,22 40:4,10 41:10 42:2 57:2 58:20 58:21 59:5,15 60:11,17,18 72:6 72:9 80:13 82:17 82:20 83:1 90:17 92:17 94:19 95:1 152:22 168:7,11 178:14 179:7 184:21 209:9 212:20 216:16 229:13,18 235:18 236:6 246:6 247:15 248:6,11 248:14 254:14 258:3,9 272:4	<b>check</b> 49:15 79:20 85:19 114:2 157:15 200:3	<b>choose</b> 49:19 122:11 134:2 162:11 197:5
<b>category</b> 245:4		<b>changed</b> 91:2 105:15	<b>chemical</b> 70:1	<b>chose</b> 89:20
<b>cause</b> 120:11 221:14		<b>changes</b> 19:20 125:9 146:4,7 196:15 197:10 257:16 258:18	<b>CHERRCO</b> 140:3	<b>chosen</b> 50:2
<b>causes</b> 99:7		<b>charging</b> 118:7 136:19 184:21 236:14	<b>cherries</b> 1:5 5:4 10:9 17:14 26:12 27:1,5 28:10 29:9 32:5 37:1 48:5,5 50:15,17 51:2 59:1,4 61:3,8,11 61:15,17 62:12 64:19 71:21 78:3 78:5 80:17,21 100:1,8 102:14 103:14 107:2 111:6,19 129:9 130:1,21 131:10 131:15,15,19 132:7 139:12 144:19 152:4 153:5 157:8,14 158:5,7 159:11 161:12 162:7 167:15,18 170:12 176:7,7,9 177:3 184:7 190:18 196:5,6 197:20 198:1,2 201:12,12 202:9 208:17 209:2 210:5,11,22 212:10 220:5 227:15,17 228:17 228:21 229:3,21 229:22 231:2,9,18 231:20 232:16,20 232:22 233:7 234:16,18 241:2 241:11 242:19 245:3,21,22 246:12,15,20 247:2,8,14,18 251:14,15,21 254:9,15,20,22 255:5,6,7,8,14,15 257:14,18 264:8 264:14,17,18	<b>CIAB</b> 8:14,18 26:15 48:19 49:3 49:6,12,14 50:1 50:22 98:6 113:21 114:10 117:14 123:22 127:10 138:13,19 139:3 160:9 192:19 208:17,18 224:18 227:14 228:12 231:6,7 263:14 271:20 274:7
<b>cent</b> 69:14 114:3,7 114:13,14,15,20 117:20 156:9 263:22 264:2		<b>charged</b> 173:7 226:1	<b>CHERRCO</b> 140:3	<b>circuit</b> 59:17
<b>central</b> 111:13 228:2		<b>charges</b> 171:21	<b>cherries</b> 1:5 5:4 10:9 17:14 26:12 27:1,5 28:10 29:9 32:5 37:1 48:5,5 50:15,17 51:2 59:1,4 61:3,8,11 61:15,17 62:12 64:19 71:21 78:3 78:5 80:17,21 100:1,8 102:14 103:14 107:2 111:6,19 129:9 130:1,21 131:10 131:15,15,19 132:7 139:12 144:19 152:4 153:5 157:8,14 158:5,7 159:11 161:12 162:7 167:15,18 170:12 176:7,7,9 177:3 184:7 190:18 196:5,6 197:20 198:1,2 201:12,12 202:9 208:17 209:2 210:5,11,22 212:10 220:5 227:15,17 228:17 228:21 229:3,21 229:22 231:2,9,18 231:20 232:16,20 232:22 233:7 234:16,18 241:2 241:11 242:19 245:3,21,22 246:12,15,20 247:2,8,14,18 251:14,15,21 254:9,15,20,22 255:5,6,7,8,14,15 257:14,18 264:8 264:14,17,18	
<b>cents</b> 19:12,13 29:16 30:9 38:1,2 38:22 55:20 56:1 56:7 68:21,22 69:18 70:3 100:12 101:14 104:12 106:10 108:5,11 112:8,13,16,20 121:17 122:6 129:18 130:18 131:4 178:7 188:17 189:8,10 189:10 190:11 191:6 263:16		<b>charitable</b> 244:14	<b>cherries</b> 1:5 5:4 10:9 17:14 26:12 27:1,5 28:10 29:9 32:5 37:1 48:5,5 50:15,17 51:2 59:1,4 61:3,8,11 61:15,17 62:12 64:19 71:21 78:3 78:5 80:17,21 100:1,8 102:14 103:14 107:2 111:6,19 129:9 130:1,21 131:10 131:15,15,19 132:7 139:12 144:19 152:4 153:5 157:8,14 158:5,7 159:11 161:12 162:7 167:15,18 170:12 176:7,7,9 177:3 184:7 190:18 196:5,6 197:20 198:1,2 201:12,12 202:9 208:17 209:2 210:5,11,22 212:10 220:5 227:15,17 228:17 228:21 229:3,21 229:22 231:2,9,18 231:20 232:16,20 232:22 233:7 234:16,18 241:2 241:11 242:19 245:3,21,22 246:12,15,20 247:2,8,14,18 251:14,15,21 254:9,15,20,22 255:5,6,7,8,14,15 257:14,18 264:8 264:14,17,18	
<b>certain</b> 22:20 58:12 58:13 156:7		<b>charts</b> 22:14	<b>cherries</b> 1:5 5:4 10:9 17:14 26:12 27:1,5 28:10 29:9 32:5 37:1 48:5,5 50:15,17 51:2 59:1,4 61:3,8,11 61:15,17 62:12 64:19 71:21 78:3 78:5 80:17,21 100:1,8 102:14 103:14 107:2 111:6,19 129:9 130:1,21 131:10 131:15,15,19 132:7 139:12 144:19 152:4 153:5 157:8,14 158:5,7 159:11 161:12 162:7 167:15,18 170:12 176:7,7,9 177:3 184:7 190:18 196:5,6 197:20 198:1,2 201:12,12 202:9 208:17 209:2 210:5,11,22 212:10 220:5 227:15,17 228:17 228:21 229:3,21 229:22 231:2,9,18 231:20 232:16,20 232:22 233:7 234:16,18 241:2 241:11 242:19 245:3,21,22 246:12,15,20 247:2,8,14,18 251:14,15,21 254:9,15,20,22 255:5,6,7,8,14,15 257:14,18 264:8 264:14,17,18	
		<b>cheaper</b> 130:1	<b>check</b> 49:15 79:20 85:19 114:2 157:15 200:3	
		<b>cheapest</b> 168:4	<b>CHERRCO</b> 140:3	

<b>circumstances</b> 244:9	91:9,11,21 92:19 93:3,7 95:9,12,19 95:22 96:9,12,15 96:20 97:6 113:7 116:2 118:20 121:1,7 123:14 129:2 136:1 137:15 141:8,13 143:17 144:5,11 145:8 146:12 147:10,16,20 148:1,11,20 149:2 149:9,12,18 150:6 150:10,18 153:15 155:19 156:13,16 157:21 158:20 159:14 161:6 162:15 163:11,16 163:22 164:3,7,15 165:1,8 166:19 168:13 179:13,20 180:11 181:10 183:5 184:14 186:5 188:2,10,18 189:1,3 190:3 191:10,22 192:5 193:6,10,13,17 194:2,7,13,16,19 194:22 195:5,11 195:18 200:5,19 202:11,21 203:3 203:10,19 204:3,6 204:11,17,22 205:4,7,12 206:1 206:6,9,14,18 207:3,7,11,16,19 208:4 216:7 217:16 218:10 220:9,16 222:1,9 222:12,21 223:5,8 223:11,19 224:1 226:10,14,16,19 249:1,5,13,21 250:3,7 253:15,20 256:11,16,19 257:3 271:18 274:11,18,22	275:7,9,16 276:2 276:5,9,14 <b>climbed</b> 272:16 <b>close</b> 84:16 184:8 203:13 <b>closer</b> 41:13 71:3,4 249:8 <b>clue</b> 133:19 <b>CMI</b> 113:21 142:5 208:19 263:14 <b>colder</b> 132:8,12 <b>collect</b> 167:22 176:5 <b>collectively</b> 175:15 <b>Coloma</b> 208:22 209:1 220:20 <b>Coloma's</b> 220:20 <b>column</b> 33:8,10,11 34:6,9,11,19 55:4 91:8,8,10 92:16 92:16 141:1 251:5 251:12 252:9 253:22 254:8 <b>columns</b> 251:2 <b>combination</b> 127:8 131:2 <b>come</b> 9:13,21 24:1 50:5 71:3,4 80:2 87:2 88:20 105:2 117:6 134:13,15 139:3,12,18 185:6 195:1 208:15 215:19,22 249:14 249:16 253:2 275:21 <b>comes</b> 21:14 50:19 100:2 114:2 142:15 163:7 169:1 211:3 219:6 226:9 270:16 <b>comfort</b> 44:2 <b>comfortable</b> 176:10 207:12 <b>coming</b> 34:17 73:15 117:12 128:7 186:15,21 191:19 192:10	220:4 275:4 <b>comment</b> 43:4 197:14 205:13,21 <b>commented</b> 43:4 200:2 <b>comments</b> 198:5 224:14 <b>Committee</b> 66:4 114:4 200:15 <b>committees</b> 168:9 <b>commodity</b> 103:9 <b>commonly</b> 28:11 <b>community</b> 120:7 120:13 270:17 <b>company</b> 170:15 196:2 <b>comparable</b> 108:22 113:12 <b>compare</b> 101:7 <b>compared</b> 43:11 94:22 107:6 109:1 114:16 119:3 167:7 181:1 255:22 <b>comparing</b> 263:7 <b>comparisons</b> 90:22 <b>compelling</b> 112:21 <b>competing</b> 181:1 <b>competitor</b> 185:22 186:3 <b>competitors</b> 185:20 <b>compiled</b> 22:11 111:18 <b>compiles</b> 116:13 <b>completely</b> 79:3,7 119:6 <b>completion</b> 42:7 <b>complex</b> 86:11,12 <b>compliance</b> 49:14 49:16 50:2,14,19 155:5 158:13 170:15,16 189:20 229:6 231:16 234:4,7 236:19 237:2,20 238:4,21 239:17 240:6,14 243:18 244:1	245:10,15 246:7 246:13,16 248:17 258:7 261:6 263:7 264:21 266:7 268:8 <b>comply</b> 171:8 184:1 243:21 <b>complying</b> 241:7 <b>component</b> 85:2 140:6 235:3 255:3 268:11 <b>comport</b> 243:12 <b>compounded</b> 235:16 <b>computer</b> 85:11 <b>concentrate</b> 220:21 <b>concept</b> 99:5 123:22 126:4 <b>concern</b> 206:4 213:13 <b>concerned</b> 156:5 249:14 <b>Concerning</b> 17:12 <b>concerns</b> 199:21 <b>conclude</b> 265:20 276:15 <b>conclusion</b> 98:21 258:5 273:11 <b>condition</b> 178:13 186:16 <b>conditions</b> 27:10 27:11 186:12,14 <b>confer</b> 194:8 <b>confirm</b> 226:21 227:1 <b>conflicts</b> 4:17 <b>confusing</b> 218:3 <b>confusion</b> 232:8 <b>congruous</b> 258:1 <b>conjecture</b> 68:12 73:2,4 <b>conjunction</b> 142:2 <b>consensus</b> 189:9 <b>consequence</b> 154:10 163:8 178:8 <b>consequences</b>
-------------------------------	--	---	--	---

174:5 197:16 201:4 <b>consequently</b> 232:13 235:2 264:22 <b>conservative</b> 171:1 178:3 <b>consider</b> 133:2 157:13 212:5 <b>considerable</b> 239:6 245:1 <b>considerably</b> 245:12 <b>considered</b> 151:12 199:6 229:20 232:7 <b>consistent</b> 90:2 <b>consistently</b> 177:7 <b>constant</b> 106:20 250:18,21 256:2 257:15 270:16 <b>constraints</b> 265:15 267:6 <b>constrict</b> 269:13 <b>construct</b> 231:17 <b>constructed</b> 253:4 256:9 261:4 <b>constructive</b> 171:14 <b>consumer</b> 41:10 43:7 44:1 <b>consumers</b> 30:4 <b>consumption</b> 30:4 36:15,22 41:9,13 118:3 <b>contact</b> 115:7 <b>contacted</b> 225:19 <b>CONTENTS</b> 3:1 <b>continue</b> 78:20 82:22 118:19 120:1 179:10 201:18 264:19 265:22 268:7,22 275:20 <b>contrast</b> 269:8 <b>contribute</b> 232:11 239:20 241:1	<b>contributing</b> 114:13 <b>contributions</b> 244:14 <b>control</b> 27:16 28:13 56:15 228:21 <b>controlling</b> 27:18 <b>conventional</b> 34:15 <b>conveyed</b> 131:13 <b>convince</b> 196:11,13 <b>cool</b> 132:6 <b>cooling</b> 108:15 129:12 130:20 131:9 154:21 <b>cooperative</b> 171:16 171:17 175:12 183:2 185:19 190:16 196:8 199:1 201:10,22 <b>cooperatives</b> 175:13 <b>coordinator</b> 98:10 115:11 <b>copies</b> 15:19 25:6 96:10 148:3,6,13 <b>copy</b> 25:3,4,5 138:8 141:3 143:12,14 143:19 144:3 148:10,14 149:20 <b>corp</b> 160:15 <b>correct</b> 16:12 22:14 26:5 51:9 56:21 67:18,19 68:5 74:20 83:4 89:11 93:18 97:17 126:11 139:6 145:21 157:2 163:8 173:22 179:19 187:9 212:2,14 225:5 <b>correcting</b> 63:6 <b>correctly</b> 148:17 <b>correlation</b> 243:2 <b>cost</b> 41:1 56:7 69:4 69:6,7,10,12,13 69:18 70:6,14,19 70:22 71:6,8	73:19 78:4,7,8 108:1,3,9,12,15 109:7,10,13,18 110:15 111:7,10 111:12,21 112:1,3 112:6,8,12,22 113:2,18,19 114:17 121:3 122:13,14 126:14 129:14 130:5,6,8 130:10,11,13,18 130:19 131:3 136:6 154:7 158:12 160:3,22 168:4 171:19 172:1 180:8 187:9 245:18 <b>costly</b> 171:19 181:4 <b>costs</b> 41:2,3 69:22 70:1,2,2,2 109:13 109:15 110:2 111:5 113:6 114:10 129:10,11 129:17,22 130:20 144:18 154:19,20 155:1 156:4 162:2 168:6 187:11,12 214:6 215:1 246:2 263:12,13,19,21 264:5 <b>counsel</b> 5:11,16 6:15,16 8:2,8 <b>count</b> 80:10 139:12 198:1 <b>counted</b> 45:9 81:1 81:3,4,5,11 <b>country</b> 33:21 227:16 <b>County</b> 165:17 196:3 <b>couple</b> 21:6 47:16 56:10 67:11 77:12 129:11 134:21 136:8 137:19 146:16 153:21 161:10 173:4 175:19,20 184:4	191:17 198:15 214:7 260:13 261:16 262:14 <b>coupled</b> 152:3 <b>course</b> 114:21 236:6 <b>Court</b> 1:12 148:15 276:7 <b>courtroom</b> 1:13 195:2 276:6 <b>covered</b> 222:6 <b>covering</b> 113:5 180:8 <b>covers</b> 36:19 <b>co-author</b> 110:15 <b>co-authored</b> 110:17 <b>cracks</b> 173:20 <b>craft</b> 244:1 <b>crafted</b> 82:1 225:9 232:1 <b>create</b> 139:6 <b>created</b> 228:6 235:9 258:20 <b>creates</b> 232:8 239:5 <b>creating</b> 167:6 168:9 <b>credit</b> 34:20 124:8 124:10 125:4,8 151:19 152:9 153:1 167:11,13 167:16 169:14,15 169:19 173:8 174:19 175:6 197:8 199:16 <b>credits</b> 27:4 28:22 29:3,10,11 36:2 36:10 38:18,22 39:8,21 41:22 42:1 45:21 93:16 93:20 119:3 122:4 122:7 123:20 124:2 125:7,21 133:12 151:19 152:1,7,8,13,13 152:14 154:14 166:5,9 167:8,14	168:1 169:13 170:3,9 172:11,17 173:14 180:16,17 180:17 183:22 184:22 185:20 186:1 196:17 211:4 213:14 221:5 230:19 240:5 244:11,18 245:18 246:3,5,10 247:2 248:3,16 266:10,10 273:4 273:13 <b>critical</b> 117:19 120:1,1 <b>crop</b> 17:16 28:1,5 28:16,18,19 29:17 31:4 32:16 33:8,9 33:15,16,18 35:12 35:16 36:21 37:4 37:8,16 38:3 40:8 40:12 41:20 45:1 46:6 51:21 52:1,6 52:13,14,17,20 53:3,7,21 54:1,16 55:4 57:11 60:7,7 60:8 62:15 67:3,4 69:11,12 70:16 73:6,11,11 75:18 75:20 77:20 79:15 79:17 80:2,6 81:9 84:7 88:18 89:2,7 89:10 90:5,8,10 90:12,18 99:4,9 99:10,12 100:2 101:1 102:9,15,21 103:1,8,20 104:10 104:13,18 105:1,3 105:7,8,9 106:13 106:14,19 107:3,7 107:14 108:4,8,8 108:10,14 109:1 118:6 119:15,19 121:8,12 124:14 125:14,15,19 127:1,5,8 128:6 128:15 129:8
---	--	--	--	--

131:1,4,4 133:2 133:20 134:4,5 138:6 152:2,19 160:2,15 166:11 167:10 170:21 172:15 176:7,15 177:4,7,10,13 185:5,5 186:11,15 186:20 189:11 190:17,21 191:8 191:12,19 203:15 203:21 204:13 209:17,18 210:18 211:3,17,19 213:6 215:1,11,13,22 217:9 219:22 220:2 226:15 228:9,11 233:3 235:19 236:11 238:4 241:3,7,16 241:18 242:3,4,6 242:14,15,16,20 243:14 250:10 252:7 265:7,8 266:17,21,22 267:3,14,15 268:9 268:13,19,20 270:20 273:7,19 <b>cropped</b> 177:10 <b>crops</b> 33:12,13 39:13 44:22 99:19 100:20 105:1,4,6 109:2,2 119:16 127:4,12 129:20 154:5 175:20,21 188:14 209:3 213:19 216:21 217:1 265:8 266:1 266:5 267:2 268:3 269:6 <b>crop's</b> 217:8 <b>cross</b> 21:12,16 22:3 23:17 24:2 215:3 <b>crowd</b> 193:21 <b>current</b> 27:3 32:22 39:7,11 40:2 55:6 74:19 79:5,10,15	115:9 229:12 230:7 231:17 255:21 267:17,22 <b>currently</b> 6:8 26:18 44:19 45:3 73:9 81:3,11 119:4 151:15,20 165:20 231:22 248:2,6,7 253:4 256:9 261:4 <b>customer</b> 34:12,13 <b>customers</b> 32:2 34:9,14 35:18 36:18 37:20 <b>customer's</b> 34:5 <b>cut</b> 216:3 <hr/> <b>D</b> <b>D</b> 195:9 271:17 <b>damaged</b> 217:9 <b>Daryl</b> 3:10 195:6,9 195:14 <b>data</b> 3:19,19 17:20 17:22 22:7,12 100:2,2 102:10,15 104:20,21 105:4 105:10,13,20 111:17 112:18 113:15 116:8,9,13 116:16 123:5 137:21 138:4,9,14 138:17 140:14,16 140:19 142:4,13 <b>date</b> 40:15 102:8 108:19 127:3 139:1,16 <b>dated</b> 144:17 <b>David</b> 9:2 165:16 <b>day</b> 276:16 <b>days</b> 9:16 71:22 72:2,4 191:17 <b>deal</b> 62:6 76:15 82:18,21 107:16 181:4 209:20 246:13 260:5,7,21 <b>dealing</b> 152:11 230:6 244:4 260:11,16 273:18	<b>deals</b> 38:5 214:3 259:19 <b>dealt</b> 37:21 <b>decades</b> 139:9 <b>December</b> 16:19,20 <b>decide</b> 21:11 50:13 50:13 135:7 169:3 238:17 <b>decided</b> 139:14 <b>decision</b> 4:16 57:18 135:18 155:17 160:10 161:1,3 171:22,22 172:3 172:19,19 173:19 188:14 241:4,10 246:19 264:8 268:11 <b>decisions</b> 157:12 212:21 213:8,15 241:1 242:21 243:13 265:1 <b>decision-making</b> 10:13 <b>decline</b> 236:14 237:10 272:18 <b>declined</b> 18:9 237:19 238:15 <b>declining</b> 272:13 <b>decrease</b> 42:4 219:18 237:21 <b>decreased</b> 166:17 167:4 <b>decreases</b> 108:9 <b>deduction</b> 114:3,7 <b>deep</b> 132:1 <b>default</b> 244:4 <b>defer</b> 167:12,12 <b>define</b> 229:22 <b>defined</b> 78:15 <b>definitely</b> 135:20 170:14 172:12 175:3 <b>definition</b> 73:13,22 76:7,20 146:21 147:5 151:13 181:19 184:21 212:4 235:17,18	236:5 251:14 <b>definitions</b> 182:18 <b>degree</b> 17:7,9 234:15 241:14 258:2 267:12 270:19 <b>delay</b> 246:19 <b>delineated</b> 228:2 231:5 <b>deliver</b> 50:13,14,18 133:15,15,16 166:18 167:5 168:20 169:18 170:5 197:21 264:8,11 265:18 268:12,18 269:12 <b>delivered</b> 38:4 225:22 231:21 232:3,16 234:18 235:8 236:1 239:14 254:2,10 255:20 264:16 266:16 268:5,10 268:21 269:7 <b>Deliveries</b> 267:10 <b>delivering</b> 71:7 122:3 <b>delivers</b> 136:20 <b>delivery</b> 264:14 267:7 268:17 269:1 <b>demand</b> 117:19 169:22 232:20 233:2 250:22 255:16,22 257:14 259:8 265:14 266:14 <b>demonstrable</b> 243:2 274:1 <b>demonstrate</b> 248:14 <b>demonstrated</b> 270:10 <b>demonstrative</b> 271:5 <b>Department</b> 1:1 5:2,15 8:7 16:16	17:13 23:9,14 <b>depend</b> 70:15,16 211:19 <b>dependent</b> 140:17 264:9 <b>depending</b> 81:15 108:10 137:11 162:9 236:8 244:8 <b>depends</b> 185:4 211:16,20 <b>depicted</b> 19:18 <b>depress</b> 74:6 262:20 <b>depressed</b> 41:6 <b>depressing</b> 128:4 128:13 <b>depression</b> 41:3 <b>depth</b> 131:20 <b>DeRuiter</b> 3:8,20 147:21 148:9,18 148:19 149:3,21 150:4,4,7,9,14,22 151:8,8,11 152:10 153:17 154:1 156:17 157:6,9 163:12,13 203:12 203:16 <b>DeRuiter's</b> 203:12 <b>describe</b> 65:15,21 200:8 <b>described</b> 230:3 231:10 262:15 <b>describing</b> 266:20 <b>description</b> 162:22 <b>desert</b> 118:9,12 <b>desirable</b> 134:17 <b>desired</b> 228:20 <b>Deskins</b> 2:5 5:12,13 5:14,19,21 9:14 9:15 10:4,5,6 11:19,20 12:4,18 13:6,11,14 14:2 14:11 15:1,11,13 15:21 16:6,8 20:7 21:21,22 24:4,13 24:14 95:21 137:15,17 140:1
---	---	--	--	--

140:21 145:16	72:7 77:12 85:20	<b>disrupted</b> 239:18	217:7 221:5,15	221:8 240:9 241:2
149:11,17 164:2	86:18 90:15 126:9	<b>dissect</b> 58:17	229:7,15,16 230:4	241:11 264:8,18
193:12 206:16	193:1 196:4,20	<b>distinction</b> 234:5	230:18,19 231:2,8	266:13 267:19
<b>destroy</b> 29:9 31:4	199:4 201:11	<b>district</b> 98:5,8	231:14 232:1,10	268:4,12
35:13 36:6,22	256:7 257:9,12	107:2 115:9 139:2	234:1 235:14	<b>diverted</b> 80:22 88:1
37:3,21 38:8	265:2	139:6,8 151:10	236:16 237:16,17	129:9 134:5 152:5
39:11 40:9,14,19	<b>difficult</b> 265:15	<b>districts</b> 64:19	237:22 238:3,4,11	152:6,14,16
45:22 49:2 50:18	<b>difficulty</b> 232:9	227:22 228:4	239:5,9,12 240:3	159:20 162:3,6
<b>destroyed</b> 38:2	238:1	232:12 233:9,13	240:5,20,21	226:2 229:22
40:20,21 46:2	<b>diminishing</b> 238:19	233:16 252:19,22	241:14 242:8,13	236:2 242:5
50:21 51:1 52:5	240:4	253:2,12 256:22	242:15,17,20	245:20 246:1
57:21 244:14	<b>dire</b> 21:10	257:1	243:11,13,16	247:18 251:15,21
<b>destruction</b> 27:5	<b>direct</b> 42:10 270:4	<b>diversion</b> 27:4 29:3	244:11,18,22	255:1,14,19
33:16,17 36:9	<b>directly</b> 229:4	29:10 30:15 31:9	245:18,19 246:3,4	257:18
40:18 52:1 80:5	<b>director</b> 8:18	31:13,22 32:18	246:10,18 247:1	<b>diverting</b> 78:3
80:10,16 90:5,20	208:18 223:16	35:11 39:8,10,21	248:2,4,16 250:17	134:1 154:6
92:3 94:8,18	<b>Directors</b> 200:16	41:21 42:5 45:2,7	251:10 252:2,5,12	157:13 158:7
<b>detail</b> 44:18 116:5	<b>disadvantage</b> 77:18	45:8,20 46:13	252:14,18 254:15	160:18 170:12
<b>details</b> 225:8	213:1,12 215:17	48:1,4,7 51:19	260:12 263:2,18	183:16
<b>deteriorated</b>	<b>disaster</b> 103:20	54:3,18 55:14	265:5,6,10 266:9	<b>diverts</b> 48:4 167:15
199:14	<b>discounted</b> 233:21	56:17,18 60:19	267:12,19 268:2	<b>divide</b> 59:10 60:14
<b>determination</b>	248:5	61:1,6,20 64:3,13	268:14,21 269:3	60:15,16 130:6
239:21	<b>discounting</b> 171:12	67:16 70:11,12	269:15 273:13,16	<b>divided</b> 60:6 79:16
<b>determined</b> 45:11	235:13,14	72:18,22 78:3,10	<b>diversions</b> 37:6,10	80:9 84:20 88:18
45:12	<b>discourage</b> 79:1	78:13,14 93:15	40:3 44:16,19	130:15 256:6,14
<b>determines</b> 79:16	<b>discouraged</b> 30:15	95:1 99:2 100:22	45:17 58:3 62:1,8	256:19
<b>determining</b> 60:13	31:9	102:2,18 106:6	62:19 64:22 67:14	<b>divider</b> 257:15,16
81:8 88:8 199:10	<b>discouragement</b>	108:6 119:6,12,21	68:11 70:10 77:15	<b>dividing</b> 202:15
<b>deterrent</b> 197:8	53:14	120:12 121:6,14	78:9 107:18,20	257:6
<b>develop</b> 184:10	<b>discourages</b> 230:8	122:4,7 124:8,10	163:1 166:4,4	<b>Division</b> 1:12,21
245:19	<b>discussed</b> 56:13	124:16 125:8,10	172:8 196:16	2:2 8:8
<b>developed</b> 27:14	65:15,20 66:2,6	125:16,21 126:13	230:9 231:3,7	<b>divisor</b> 136:19
124:3	248:13	135:17 136:14,16	232:7,14 233:20	<b>docket</b> 1:5 5:1,6,6
<b>developing</b> 220:21	<b>discussing</b> 10:15	136:22 137:3	239:19 241:17	<b>document</b> 3:21
221:2	270:13	145:20 151:19	242:12 245:12	13:9 20:15 144:16
<b>development</b> 78:15	<b>discussion</b> 18:2	153:22 154:2,14	248:7 254:4,7	149:5 150:8
<b>DeWitt</b> 8:20	30:12 42:21	155:7 160:17	261:13 265:21	224:10,11 225:10
<b>dialogue</b> 264:9	184:17 237:8	163:8 165:20	266:3 267:4	<b>documentation</b>
<b>diameter</b> 160:7	250:12	166:9,13 167:22	269:19	28:9
<b>dictate</b> 161:15	<b>discussions</b> 68:2	168:2,5 170:9	<b>divert</b> 52:9 54:17	<b>documents</b> 97:13
<b>difference</b> 41:18	221:11 224:19	172:10 175:18	62:11,12 122:21	97:16 224:9,17
67:3 90:4 101:9	<b>disincentive</b> 39:11	176:14 183:10	133:3,3 134:11,19	225:12
112:1 119:18	54:16,22 73:10	196:16 199:15	135:5 153:2	<b>doing</b> 78:22 97:11
127:14 261:12	106:3 240:2	209:9 210:3,5,7,9	155:15 158:4	121:20 131:18
<b>differences</b> 119:15	<b>disparate</b> 159:3	211:3,4,12,21	160:9,12 161:4,12	139:9,10,15 151:1
<b>different</b> 48:12	<b>disproportioned</b>	213:2 214:17	197:6 199:8 211:6	155:12,13 175:19
57:21 63:2 65:7	32:20	215:7 216:14,20	212:21 217:1	191:19 197:8

221:14	146:18 174:14	42:18 87:13	<b>enhance</b> 185:2	136:17 139:14
<b>dollar</b> 189:19 234:8	185:8 187:8	110:10 113:21	273:15	235:21 236:3,13
264:22	190:11 201:4	133:21 135:4	<b>enhanced</b> 185:22	250:14 251:13,16
<b>dollars</b> 117:2,3,11	225:21 226:6	152:17 154:4	<b>enormous</b> 53:17	255:18
<b>domestic</b> 27:17	251:22 261:15	159:22 169:21	<b>enter</b> 193:8	<b>estimated</b> 52:17,18
28:2,7,12 32:2	275:13 276:1	174:5 176:10	<b>enterprise</b> 202:15	52:20 67:22 100:4
59:2,13 84:11	<b>early</b> 72:11 111:8	213:13 215:3	<b>entice</b> 40:19	252:7
89:17 228:17	212:20 213:22	225:22 236:7,14	<b>entire</b> 28:4 39:15	<b>estimates</b> 68:1,3,5
<b>doubt</b> 78:16,16	214:2 236:20	240:8 244:7 263:7	49:19 170:15	68:6,9 139:8
<b>downside</b> 136:10	239:10 245:2	<b>elect</b> 268:3	<b>entirety</b> 23:11	181:8
<b>downward</b> 270:21	275:22	<b>electronically</b>	<b>entities</b> 229:2	<b>estimation</b> 70:13
<b>Dr</b> 115:8	<b>earn</b> 119:2 244:10	115:14	<b>entity</b> 45:4 140:8	<b>et</b> 227:20
<b>drafted</b> 166:8	247:1	<b>element</b> 184:18	157:8 174:6,7	<b>EU</b> 181:2
<b>dramatically</b> 69:11	<b>ease</b> 87:18	<b>elements</b> 246:8	198:12	<b>event</b> 103:4 118:5
118:7 263:6	<b>easier</b> 172:3 184:10	254:22	<b>entry</b> 12:6	196:21,22
<b>dried</b> 118:11	209:15,16 223:2	<b>eliminate</b> 226:4,8	<b>environment</b>	<b>events</b> 200:17
<b>driven</b> 135:13	<b>easy</b> 180:9 218:7	<b>eliminated</b> 263:15	228:15	<b>everybody</b> 117:18
215:13	<b>eating</b> 191:2	<b>eliminates</b> 248:6	<b>envision</b> 183:9	119:19 166:21
<b>drives</b> 242:20	<b>economic</b> 7:21	<b>email</b> 115:18	<b>envisioned</b> 40:6	192:21 206:15
<b>driving</b> 259:2	16:21 17:1 23:12	<b>emphasis</b> 189:15	46:8	223:2 276:13,15
<b>drop</b> 122:18 125:7	27:15 78:21 115:3	<b>employees</b> 10:13	<b>equal</b> 39:9 66:21	<b>evidence</b> 12:17
177:22	120:19 121:10	<b>encourage</b> 77:20	70:10,11 72:19	13:5,21 14:1,8,10
<b>dropped</b> 114:22	152:17 155:16	90:19 119:8 135:9	273:18	14:20,22 20:18
183:13,19	159:21 160:19	166:12 268:16	<b>equals</b> 152:8	21:1,4,18,20
<b>dropping</b> 183:15	161:1 178:13	<b>encouraged</b> 30:16	<b>equate</b> 155:6	81:22 96:4 141:11
214:10	240:12	31:10 167:11	<b>equates</b> 56:1	149:13,16,19
<b>drops</b> 103:22	<b>economically</b> 78:22	264:11 270:1	<b>equation</b> 254:22	150:3 164:4,6
<b>dry</b> 131:18	<b>economics</b> 17:10	<b>encouragement</b>	258:6	193:9,14,16
<b>due</b> 32:13 39:12	111:4 120:15	69:16 70:4,5	<b>equations</b> 251:12	<b>evidentiary</b> 4:19
52:2 95:6 266:17	143:3 144:16	<b>encourages</b> 221:5	<b>equilibration</b>	<b>exact</b> 69:9 94:12
<b>duly</b> 11:16 25:20	<b>Economist</b> 16:22	<b>encouraging</b> 77:22	132:17	<b>exactly</b> 18:21 46:19
97:4 141:18	<b>economy</b> 177:20	176:14	<b>equivalent</b> 36:17	52:11 100:7
150:16 165:6	<b>edification</b> 23:7	<b>ended</b> 53:4 171:20	93:22 196:16	136:17 172:10
195:16 208:2	<b>effect</b> 127:19 128:4	174:20	199:16 250:1	181:7
<b>duplicate</b> 226:4	128:13,17 134:21	<b>engage</b> 200:12	<b>Eric</b> 275:20	<b>examination</b> 16:7
<b>duplicative</b> 271:9	201:7 262:17	246:17 263:2	<b>error</b> 188:1 189:5,6	21:12 22:4 23:18
<b>duties</b> 17:1	263:5	269:18	189:8	24:3 26:2 42:11
<b>dynamic</b> 268:2	<b>effective</b> 78:4 252:1	<b>Engeler</b> 2:6 6:3,4	<b>especially</b> 209:13	47:12 63:15 67:9
<b>D-e-R-u-i-t-e-r</b>	<b>effectively</b> 230:6,8	47:13 61:16 63:9	209:21 230:9	71:11 72:14 74:16
150:5	232:14 240:17	63:12 72:13,15	240:18	76:1 82:14 83:21
<b>D-e-s-k-i-n-s</b> 6:1	<b>effects</b> 182:21	83:20,22 129:4,6	<b>essentially</b> 50:13	84:18 93:11 94:3
<b>D-e-W-i-t-t</b> 8:21	<b>efficient</b> 111:19	132:20 143:1	<b>establish</b> 52:16,19	97:8 111:1 123:15
<b>D.C</b> 7:1 8:9	<b>efforts</b> 120:7	156:19 186:7	233:19	129:5 131:6
	<b>effort's</b> 192:11	205:12,14 216:10	<b>established</b> 28:4	132:19 136:2
<hr/>	<b>eight</b> 34:7,18,19	218:11,13 225:6	61:22 169:8 260:4	137:16 142:22
<b>E</b>	190:6	249:18 250:4,5	<b>estimate</b> 52:17	145:15 146:13
<b>e</b> 7:20	<b>either</b> 6:15 26:16	275:11,12 276:12	57:22 129:14	150:20 153:18
<b>earlier</b> 143:3				

155:20 156:18 158:1,21 159:15 161:7 162:16 165:9 168:17 181:11 183:6 184:15 195:19 200:22 208:6 212:17 216:9 217:18 218:12 220:17 224:6 <b>examine</b> 21:16 22:3 <b>examined</b> 11:16 25:20 97:4 141:18 150:16 165:6 195:16 208:2 <b>example</b> 22:18 31:18,20 32:1,15 34:1 35:10,16 36:12 37:5,10,14 38:11,12 39:4 41:15 44:10,14 51:16 55:3,17,17 59:8 75:4 84:16 90:3 91:14 92:13 121:16 123:4 126:22 136:21 196:18 201:15 226:5 234:9 237:12 238:21 248:14,15 <b>examples</b> 29:14 31:1,6 84:15 90:2 <b>exceed</b> 71:4 233:1 <b>exceeds</b> 258:9 265:13 <b>exception</b> 111:7 138:5 <b>exceptional</b> 134:10 <b>excess</b> 35:8,9 36:9 38:15,18 39:21 59:7 73:17 102:2 122:2,6 134:11 152:4 153:5 174:20 255:7,9,15 257:8,14 260:19 <b>excessive</b> 39:13 40:22	<b>excessively</b> 104:11 <b>exchanges</b> 30:3 <b>excuse</b> 155:5 234:13 235:18 238:15 261:20 <b>Executive</b> 8:18 223:16 <b>exhibit</b> 3:13 10:20 12:5,9,14,16,18 12:20 13:2,4,6,7 13:15,15,20,22 14:2,7,9,11,19,21 15:2,6,14,14 20:8 20:17,17,20,22 21:3,11,14,18,19 25:8,10 95:18,22 96:3 116:5,6 137:19,20 138:2 138:11 140:2,4 144:7 148:21 149:2,10,12,14,15 149:18,20,21 150:2 151:3 163:21 164:1,3,5 164:11,13,16 188:19 193:13,15 203:12,13 224:3 243:5 248:18 250:2,7 266:18 269:6 271:2,17 <b>exhibits</b> 4:15 12:1 97:14 148:7 149:7 <b>existing</b> 268:5 <b>exists</b> 62:9 166:11 <b>expand</b> 114:11 117:19 118:16 126:17 159:18 245:9 <b>expansion</b> 153:7 167:17,20 169:11 169:20 170:17 171:8 180:21 244:13 260:15 261:2 <b>expect</b> 36:18 122:8 129:18 158:16,18 <b>expected</b> 30:7	264:16 <b>expedite</b> 153:12 <b>expenses</b> 41:4 109:18 154:21 <b>expensive</b> 73:18 <b>experience</b> 37:16 43:21 113:20 178:15 186:12 270:22 <b>experienced</b> 40:15 84:17 <b>Experiment</b> 98:13 <b>expert</b> 55:20 <b>expired</b> 166:7 <b>explain</b> 43:1 44:17 48:3 58:14 84:3 93:4 131:8 158:4 198:19 <b>explaining</b> 123:22 <b>export</b> 32:6 35:7 36:10 41:22 66:13 78:15 91:19 92:5 92:11 93:15 95:2 123:2 124:6,10 152:13 153:6 167:16,20 169:10 169:20 170:17 171:7 180:21,21 244:12 245:2 <b>exporter</b> 201:16 <b>exporters</b> 77:13 <b>exporting</b> 29:1,2 43:16 65:6 133:10 <b>exports</b> 66:11 136:21 260:14 261:1 <b>expound</b> 166:10 168:21 <b>express</b> 222:8 <b>Extension</b> 98:9 105:12 110:14 115:6 <b>extent</b> 128:15 138:18 <b>extra</b> 124:19 203:8 <b>extracted</b> 132:14 <b>extrapolate</b> 50:4	<b>extremely</b> 75:15 <b>e-l-l</b> 145:5 <b>E-n-g-e</b> 6:4 <b>e-s</b> 96:19 <hr/> <b>F</b> <hr/> <b>face</b> 267:6,7 <b>faced</b> 166:15 167:2 <b>Facer</b> 3:4,18 25:1 25:12,16,18 26:4 26:9 42:10,16,18 47:11,14 63:17 76:4 81:16 83:11 83:19 86:17 88:6 95:15 154:15 162:18 178:5 206:2,3 231:10 <b>faces</b> 265:14 <b>facilities</b> 78:18 265:16 <b>facility</b> 163:7 <b>fact</b> 54:4 93:19 101:15 138:22 175:10 184:22 190:14 213:13 232:6 235:16 239:19 243:2 250:11,14 255:17 258:19 264:14 266:2 270:11,20 274:4,5 <b>factor</b> 113:13 133:6 134:13 170:4 199:10 241:4 258:11,21 259:3 260:16 <b>factored</b> 58:3 <b>factors</b> 133:1 134:21 157:13 240:22 241:5,10 243:15 <b>fair</b> 46:15,15 <b>fairly</b> 98:3 102:17 126:16 273:1 <b>fall</b> 125:22 162:8 213:17 <b>falls</b> 210:8 212:8	<b>familiar</b> 206:18 227:21 <b>family</b> 116:12 165:17 208:15 <b>far</b> 75:3 102:11,15 156:4 202:8 223:21 265:13 <b>farm</b> 100:13 102:3 104:12,15 106:11 108:21 109:3 140:15 165:17 208:15 271:6,9 272:1,13,14,15,19 272:22 273:2,10 <b>farms</b> 38:6 148:18 149:3 151:8,11 152:10 154:1 157:6,9 <b>fashion</b> 4:20 263:3 265:17 267:11 <b>fast</b> 153:10 187:2 192:11 204:7 205:9 <b>favor</b> 26:10 66:8,10 66:16 151:17 196:14 211:9 268:22 <b>favorable</b> 186:15 <b>FDA</b> 212:4 <b>fear</b> 120:11 <b>federal</b> 4:8 12:7 17:4,6 26:11,12 26:21,22 99:14 108:19 151:10 191:13 227:14 <b>feel</b> 76:21 81:18 176:16 <b>feeling</b> 209:6 <b>feels</b> 192:21 264:16 <b>fees</b> 168:6 <b>fellow</b> 141:22 <b>felt</b> 46:21 <b>FETRIDGE</b> 2:10 7:18 11:10 76:2 <b>fewer</b> 226:2 <b>fictitious</b> 55:6 <b>field</b> 7:1 132:7,16
--	---	---	--	---

<b>fifteen</b> 75:19 81:15 82:5	157:14 164:19 165:6 169:4	224:19 244:21 271:13	265:3	39:11 40:10,14,19 40:21 48:14,17
<b>figure</b> 20:1 142:18 180:20 201:11 251:10 258:19 260:1 276:10	173:14,17 182:3 189:17 191:16 194:10 195:16 197:17,17 201:20 208:2 211:13,17 213:2,7 215:17 217:13 228:8 257:21 275:1	<b>follows</b> 11:17 25:21 97:5 141:19 150:17 165:7 195:17 208:3	<b>formulations</b> 251:9 255:21 256:3 257:12 260:2	52:4,9 53:8,9,14 55:19 59:11,13 60:10,17 71:7 73:10,12 77:13,21 99:6 101:21 106:5 107:22 108:16 114:22 122:22 124:11,21 131:22 132:12 135:1,1,20 136:15 137:2,11 139:21 152:6,12 152:16 153:2,2 155:11 159:20 161:14 162:12 163:6 172:5,21,22 173:2,7,17,18 174:11,12 176:4 184:5 197:1 202:3 214:10 219:6,10 221:13 238:17 239:14 240:7 245:20 251:18 261:8 263:20 265:16 267:11 270:9
<b>figured</b> 120:14	208:2 211:13,17	<b>follow-up</b> 71:13 72:16	<b>formula's</b> 260:1	
<b>figures</b> 68:4 79:4 100:7 110:18 114:18 125:10 252:10	213:2,7 215:17 217:13 228:8 257:21 275:1	<b>food</b> 6:20 53:18 140:2,7 167:12 169:3 196:7 208:22	<b>forth</b> 170:8 192:11 205:21 241:13	
<b>filed</b> 145:12	<b>first-line</b> 211:11	<b>Food</b> 200:9 220:20	<b>fortunately</b> 102:16	
<b>fill</b> 130:3 177:1 215:20 275:5	<b>fist</b> 99:16	<b>footing</b> 66:21 273:18	<b>forward</b> 23:20 48:7 195:1	
<b>filled</b> 180:2	<b>fit</b> 40:3 229:10	<b>footnote</b> 142:12 258:12,13 264:1	<b>found</b> 173:15 251:3	
<b>final</b> 29:7 50:11 52:19 55:4 56:17 62:22 181:8 184:19 191:12 218:18 237:1 241:19 251:4 253:4 254:11	<b>five</b> 38:1 89:1 91:16 92:14 95:3 99:13 99:15,16 100:12 100:18 101:3 102:3 104:3 105:6 107:4,5 108:11 109:22 112:19 121:17 125:1 127:11,13 129:18 156:6 159:8,11 198:15 272:21	<b>foods</b> 200:9 220:20	<b>four</b> 95:3,5,5,6 101:13 105:6 129:18 238:6 241:21 242:10 272:3,20,21	
<b>finally</b> 115:2	<b>fixed</b> 69:12 109:13 109:14 131:1 178:7 246:5 250:20	<b>footnoted</b> 234:4	<b>fourth</b> 159:19 236:22	
<b>find</b> 101:5 155:5 187:5 188:22 217:2 239:12,17	<b>flip</b> 137:7	<b>force</b> 219:7	<b>fragile</b> 131:22 135:1	
<b>fine</b> 12:2 82:6,7 95:13,14 97:12 143:13 206:13 207:2 219:12	<b>float</b> 131:12	<b>forced</b> 38:17	<b>frame</b> 101:6 205:17	
<b>finish</b> 9:14,20 253:16	<b>Florida</b> 7:11,13	<b>forces</b> 219:8	<b>frankly</b> 113:1 117:21	
<b>finished</b> 128:8 244:11	<b>flow</b> 106:18 107:7	<b>foreseeable</b> 201:7	<b>free</b> 28:3 37:3 39:13 41:4 59:19 61:2,4,20 64:5,15 64:17 81:18 88:10 88:12 127:20,22 169:9 228:22 233:2,4 235:3 250:20 253:13 259:8	
<b>first</b> 5:11,21 11:1,8 11:15 12:5 21:6 24:21 25:19 33:1 33:8,22 34:6,19 40:6 47:17 66:3 89:5 90:8 93:5 97:4,22 98:13,22 100:18 101:3 107:11 119:7 121:9 126:17 127:11 131:11 138:21 141:18 149:4 150:16	<b>flows</b> 239:19	<b>forgive</b> 227:6	<b>freeze</b> 103:10	
	<b>fluctuated</b> 19:4,7 19:12,16 245:12	<b>forgot</b> 11:21	<b>freezer</b> 176:6,8	
	<b>fluctuates</b> 71:15	<b>form</b> 56:19 73:18 152:11 158:10 159:10 247:5	<b>freight</b> 168:6	
	<b>fluctuation</b> 19:19 239:3	<b>formal</b> 30:1	<b>fresh</b> 100:8,9 103:12	
	<b>flush</b> 132:15	<b>formalization</b> 225:7	<b>Fresno</b> 6:8	
	<b>foam</b> 223:3	<b>formally</b> 49:1	<b>friendly</b> 153:5	
	<b>focus</b> 221:12	<b>former</b> 116:11	<b>front</b> 249:6	
	<b>folks</b> 110:20 194:4	<b>formula</b> 28:4 33:2 57:11 58:16,17,17 84:9 88:17 151:21 168:7 211:21 230:1,17 232:13 232:18 233:6 251:3 252:10 254:1 258:4,8 259:4,20 261:4 264:20 267:16	<b>frost</b> 186:17	
	<b>follow</b> 58:10 76:18 133:22 190:2 225:6	<b>formulas</b> 88:8	<b>frozen</b> 41:2 73:17 73:18 74:2 208:22 220:20	
	<b>following</b> 37:15 56:6 103:19 194:5	<b>formulating</b> 224:20	<b>fruit</b> 7:5,20 35:7,21 35:22 36:6,7 37:22 38:1,6,8	
		<b>formulation</b> 87:6 254:1 256:10 259:13 260:22		<b>frustration</b> 109:5 <b>fuel</b> 70:2 187:13 <b>fulfilled</b> 246:17 <b>full</b> 11:9 96:17 105:1,1,2,4,7 167:13 169:14 173:6,8 176:8,19 180:1 207:13 <b>function</b> 116:21 127:8 130:21 <b>functioning</b> 273:14 <b>functions</b> 129:14 <b>fund</b> 117:6 139:15 <b>fundamentally</b> 113:16 118:2 <b>funding</b> 228:22 <b>funnel</b> 45:6

<b>further</b> 21:22 24:4 24:14 138:7,10 146:10 158:4 179:11 206:7 273:5	<b>generation</b> 57:9 110:9	253:15 258:21 261:9 276:17	251:8 256:4 257:10 258:2 259:20 262:6,12 262:19 264:9,19 275:21	251:19 258:16,19 258:22 260:17
<b>Furthermore</b> 266:12	<b>generically</b> 146:6	<b>goal</b> 269:22	<b>good</b> 5:13 6:9,18 7:2 8:1,15,16 10:2 12:3 16:3 18:22 47:14 63:17 76:3 115:5 128:2 133:5 143:10,11 149:21 150:10 151:2 177:11 181:1 185:8 194:22 195:21 208:8,11 209:12,20 215:4 220:2,3,13 246:20 250:3	<b>ground</b> 35:7,21 36:1 48:5,14 53:8 53:9,15 55:20 62:13 73:10 77:21 90:9,11,13 101:21 102:20 106:5 115:1 121:18,19 121:22 122:2,22 123:8 124:12,15 125:14 128:22 129:9 132:18 134:18 135:8,9,21 136:15 137:1 152:5,8 162:8,11 167:12,13,15 169:13 170:10,12 171:3,9 174:14 175:5 178:1,3 180:18 202:3 209:18 210:19,21 211:7 219:10 220:5
<b>future</b> 153:4 168:12 172:4 176:12 193:5 209:19 225:4	<b>geographic</b> 72:3	<b>goals</b> 201:10	<b>gotten</b> 178:10	<b>group</b> 111:15 206:20
<b>FV-10-930-5</b> 1:7 5:7	<b>getting</b> 78:2 132:9 170:15 183:18 197:7	<b>goes</b> 41:21 42:2 45:15 55:10,15 73:13 80:12 90:11 90:12 102:11 114:4 127:6 130:14 136:14 137:11 175:4 210:4 213:4 251:17 257:8 261:8 271:14,20	<b>government</b> 17:3 17:20	<b>groups</b> 111:17 <b>grow</b> 111:19 120:12 160:13 179:6 183:10 196:5 202:3
<b>F-a-c-e-r</b> 25:16	<b>gist</b> 247:12	<b>going</b> 9:16 11:2 21:8 31:7 48:17 49:11,11,20 52:12 53:3,11 54:8 56:7 57:22 58:1,20 59:3,10 62:2,13 65:2,3,5 70:8,16 71:2,3 73:7 79:1 102:14 108:7 116:5 118:14 119:5,8,11,18 121:8 122:2,12,16 124:1 129:19 133:7,17,18 134:11 135:7 136:16 137:2,9 138:10 147:22 148:9,17,20 149:7 154:18 161:15 169:3 174:1,9,11 175:21 176:3 177:21 178:2 181:3 186:19 187:5,10,21 191:1 194:3,14 207:9 210:1 211:11,13 211:14 213:17 214:20 216:17 217:8 218:15 220:3,13 225:8,9 227:11 228:5 235:2,12 237:1,7 249:11,16 250:13	<b>Governors</b> 14:12	<b>grower</b> 27:11,16,20 28:19 29:10 30:8 32:17 35:11 37:6 37:10 38:1,13,14 39:3,8 40:3,5 41:6 47:19 48:1,3,4,14 48:16 49:10 50:1 51:1,3,8,19 54:3 55:13,19 56:9,17 56:18 57:8 58:2 60:19 61:1,6,20 62:1,8 64:3,12,13 64:22 67:14,16 69:1,2 70:10,11 70:13 71:17 72:18 72:21 73:3,4 75:6
<b>G</b>	<b>give</b> 21:8 75:9,10 77:7 79:13 97:15 97:18 115:19,20 116:15 133:19 148:2,11 175:5 185:19 196:18 197:22 224:13		<b>grad</b> 116:11	
<b>G</b> 2:8	<b>given</b> 25:3 62:2 71:1 72:2,3,8 100:3 101:15 183:11 185:1 221:12 232:15 241:3 243:11 244:5 269:9		<b>graduate</b> 142:1	
<b>gate</b> 100:13 102:3 104:15 106:11 108:22 140:15 271:6,9 272:1,13 272:14,15,19,22 273:2,10	<b>gives</b> 50:1 139:7 215:17		<b>Grand</b> 1:13,22 4:6	
<b>gates</b> 109:3	<b>giving</b> 141:10		<b>graph</b> 18:6 19:2,6 19:10,14,18 242:9 242:10 272:20	
<b>gathering</b> 144:9	<b>glad</b> 126:21 222:9		<b>graphs</b> 17:16,22 18:4 22:8 27:12 271:16	
<b>gavel</b> 220:12	<b>go</b> 8:2 18:22 20:3 23:20 24:18 36:5 41:19 42:1 45:8 49:22 50:3 55:9 56:18 62:2 68:3,5 68:6,19 69:5 82:9 83:17 87:2,16,19 88:3 91:8 92:1 94:10 96:12,19 100:8 101:10,12 105:10 116:5 117:11 122:8,10 122:11 130:5,13 132:8 136:16 188:16,21 195:2 205:19 206:20 207:5 210:8 213:5 213:5 220:7 223:8 226:16 236:7,9		<b>grasp</b> 93:8	
<b>geared</b> 63:5			<b>great</b> 86:10 126:20 172:1 176:11 223:5 250:3 270:5	
<b>general</b> 5:16 8:8 65:22,22 75:3 109:3 199:2 233:11 242:11 243:12 244:20 265:7			<b>greater</b> 44:15 107:19 126:12 242:12,17 267:20	
<b>generalities</b> 75:10			<b>greatest</b> 52:4	
<b>generally</b> 66:19 108:11 122:5 198:22 253:1 267:1,4,8			<b>greatly</b> 111:22	
<b>generate</b> 50:22 119:4			<b>grid</b> 216:18	
<b>generated</b> 27:4 39:20 190:12 247:21 263:10 264:4			<b>grips</b> 160:5	
<b>generates</b> 140:8 245:16			<b>gross</b> 89:4,6 212:12 212:13 234:22	
<b>generating</b> 247:9				

76:21 77:2,15	266:2,21,22 268:1	246:21 247:4,10	<b>half</b> 32:22 98:9,13	215:14 234:1,11
78:9 91:15,17	269:2,4,7,9,15	248:9 255:17	107:3 114:3,7,13	236:17 237:2,17
92:12 93:15 95:1	270:2,3,12,13,15	261:5,20 265:2,20	114:14 117:20	237:21 243:22
97:22 98:3,4,4	270:17,17,20	266:12 267:6	169:19 215:2	246:2 264:11
99:2 100:11	271:11 273:4,6,13	268:3 269:11,18	263:16 264:2	<b>handlers</b> 27:22
101:10,19 104:11	<b>growers</b> 19:11 27:2	273:10,17,20	<b>hand</b> 51:5 96:21	28:8,14,22 29:10
105:11 106:8,15	27:5 29:9,19	<b>grower's</b> 49:7	131:12,19 141:14	29:20 31:12 36:9
107:9,18,20 108:6	31:14 35:6,20	168:4 240:12	150:12 164:10	36:11 37:14 38:18
108:13 109:14,17	36:6,8 37:20 38:2	241:10 263:11	165:2 207:20	39:20 40:13 46:21
110:3 111:17	38:5 40:14,19	<b>grower-diverted</b>	234:11 246:22	54:3,17 59:20
120:7,13 122:4	41:14 47:1 48:20	247:14	264:15	61:13 66:21 75:4
124:13,16,18	48:20,20,22 49:1	<b>grower/processor</b>	<b>handed</b> 148:16	75:9,12,14,16,18
125:8 126:13	54:17,19 62:18	185:11	<b>handing</b> 229:20	77:11,12 78:17
128:9 129:8	64:2,6,9,9 65:4	<b>growing</b> 109:19	<b>handle</b> 28:11 31:15	82:17,20 106:4
132:22 133:6,19	66:20 67:2,4,5	116:12 174:6	31:16 45:13,17	135:14 152:1
133:21 134:5	75:5,13,14,18	243:13	87:14 124:20	154:13 159:4
135:11 136:9,19	77:20 98:20	<b>grown</b> 1:5 5:4	125:9 130:22	161:14,15,21,21
140:12 142:11	101:11 106:1,5,15	269:6	131:17 136:22	182:22 226:18
145:20 146:18,21	107:21 108:21	<b>grows</b> 37:12	167:9 169:16	227:8,9 229:4
147:6 153:5,9	109:6 110:12	<b>growth</b> 85:1 86:7	173:10,18 197:13	230:20 231:15,17
154:19,21 155:7,9	111:16 112:13,17	118:10 258:11,21	199:10 230:16	232:9 233:7 238:2
155:13 157:5,6	113:1,20 114:1	259:3 260:16	231:12 232:5,8	238:17 239:8,15
158:4 160:16	117:7 119:1,10	261:2	233:7 235:1	240:6,10 241:7,8
162:9 165:18,18	120:11 121:17,19	<b>guarantee</b> 44:8	247:13	243:18,19 244:10
166:1,4,15 167:11	122:1 124:11	70:17,18 73:14	<b>handled</b> 28:11	244:17 245:1,11
167:15 168:2,3,5	126:9 132:14	158:6 191:20	41:17 124:21	245:14,17 246:4
171:13,16 172:7,9	133:15,15,16	<b>guess</b> 9:18 23:7	<b>handler</b> 28:2,10	246:10,16,17,21
172:14 173:21	134:11 137:8	44:22 49:5 62:10	31:12,21 32:1,2,5	246:22 247:4,20
175:1,9 180:17,22	140:18 154:13,17	62:10 158:8 162:9	32:8,11,19 34:3,7	248:10 254:21
181:16 182:3,12	157:8,17 158:10	173:19 198:13	35:17 36:16,19	258:9 260:5,7,18
182:15,19 185:16	161:11,20 162:10	202:7 211:16	37:2,20 38:5,10	261:5,20,21 263:2
187:14 188:1,16	167:21 171:2	219:15,16 249:15	38:10,17 39:9	265:20 266:6
190:10 202:20	172:16 175:3,7,17	<b>guys</b> 212:19 213:15	43:5,16 45:4,5,7,8	268:7,15 273:18
205:19 208:14	180:7,8 182:21	214:3 215:6 217:1	45:16 47:19,21,22	<b>handler's</b> 38:7 51:5
209:15 210:1,20	183:1,2,10,18	218:5 221:1,20	48:22 51:5,9,10	232:8 236:19
212:1,6,7 214:17	184:4,7 185:10,12	260:4	51:10 53:10 55:5	240:14 242:18
216:13,19 219:1	185:13 187:6,16		55:6,11,18 60:22	263:18
228:14 229:14,16	187:17 189:13,18	<b>H</b>	61:9 64:2,12,18	<b>handling</b> 40:2
230:4 231:8,14	190:22 196:11,12	<b>Hackert</b> 3:9,21	65:2,4 70:12	77:12 130:4 132:5
232:1,5,7,10,13	201:8 209:9,13,20	164:10,21,21	72:20 75:6 77:10	158:12 168:5
233:19 234:1,19	214:15 218:2	165:4,14 166:19	78:10,12,13,14	172:12,14 231:20
235:6,14 237:18	225:21 226:3,3,5	168:15 179:15,16	92:9 95:4 151:13	<b>handouts</b> 96:8
238:3,11,14,21	227:9 229:4	181:14 186:6,8,10	154:9,22 157:6,7	<b>hands</b> 209:15 210:2
239:5,9,19 240:20	230:22 231:8,13	191:10 193:7,18	157:7,16 158:8	<b>hanging</b> 190:22
248:4 262:17,21	232:9 234:2	194:11,15,18,20	159:2 172:9 173:9	<b>happen</b> 82:2 93:2
263:15 264:10,11	236:18 238:1	196:8,10 197:11	173:17 181:16	178:1 197:1 225:4
264:14,15 265:17	239:8,10 244:17	201:19 202:2	182:9,10 196:6	259:12

<b>happened</b> 53:6 62:5 69:21 202:8 233:12 252:11	<b>Haven</b> 7:10,12 <b>head</b> 110:19 205:11 <b>headed</b> 141:2 <b>heading</b> 4:22 5:1 <b>health</b> 117:4 <b>hear</b> 47:18 209:5 <b>heard</b> 153:20 199:20 264:2 <b>hearing</b> 1:15 3:14 3:16 4:7,10,20 8:4 10:5,8,9,11,14,18 12:5,20 14:15 16:11 17:14,21 18:1 145:12 153:11 218:16 276:19 <b>hearings</b> 187:4 <b>heat</b> 132:7,16 <b>Heather</b> 226:21 <b>heavily</b> 66:11 <b>heavy</b> 171:12 <b>Hedin</b> 2:18 3:6,22 8:14,16,17 9:2 26:3 42:14,20 47:3 61:10 82:6 82:15 83:6,15,17 84:19 86:5,15 87:4,5,11 88:21 93:10,12 111:2 113:7,9 116:18 118:18,21,22 120:21 123:18 131:7 138:21 139:20 140:6 141:6,8,12,16,20 153:19 162:15,17 168:16,18 179:11 179:14 184:14,16 188:6 190:1,4,5 192:8 193:19 194:5 200:7 203:18,20 204:5,9 204:15 205:10 212:18 220:16,18 222:20,22 223:1,6 223:15,19 224:8 275:3,8,19 276:3	<b>Hedin's</b> 88:1 <b>held</b> 1:17 73:22 172:22 262:1 <b>Hello</b> 97:10 146:15 150:22 <b>help</b> 17:3 74:5 77:5 99:11 107:12 121:22 126:8 138:16,19 187:18 188:19 213:14 249:8 256:11 <b>helped</b> 55:18 <b>helpful</b> 95:9,13 143:21 <b>helping</b> 126:10 186:3 <b>hereto</b> 228:10 <b>hey</b> 173:16 <b>Hi</b> 136:4 158:3 183:8 208:9 <b>hierarchy</b> 43:12 <b>high</b> 18:7,13 19:5,9 19:13,17 28:18 31:6 39:12 54:16 62:5 113:3 125:16 125:17 160:21 172:2 178:8 187:10 <b>higher</b> 30:7 39:16 40:14 41:6 70:14 70:19 72:21 106:17 112:11 113:4 128:20 132:13 151:21 158:10,18 166:16 167:2 169:17 170:22 187:11,11 187:12 217:5 218:20,21 266:6 268:18 <b>highest</b> 105:18 <b>highly</b> 27:10 <b>Hill</b> 2:17 8:3,5,6 9:18,19 12:12 13:1,19 14:6,18 20:19 21:5,15 22:2,5 23:5 24:17	24:19,22 25:6,9 26:1 47:6,7 87:20 94:4,5 95:17 96:5 97:7,9 147:17,19 147:21 148:2,8 149:6 150:19,21 158:20,22 163:18 163:20 164:9 165:8,10 193:8 195:6,20 202:14 202:22 203:1 206:12,13 207:1,8 207:9 208:5,7 222:17,19 224:2,7 227:7 253:7 274:15,21 <b>Hill's</b> 42:11 153:16 168:14 <b>Hindsight</b> 171:21 <b>historic</b> 33:6 <b>historical</b> 136:5 240:19 266:4 <b>historically</b> 27:9 43:17 99:6 122:7 <b>history</b> 105:22 154:1 265:4 <b>hit</b> 125:19 <b>hold</b> 131:14 240:8 <b>holds</b> 73:17 <b>home</b> 184:5 203:9 217:2 <b>Honor</b> 12:13 13:19 22:6 42:14 47:4,8 83:7 86:15 95:17 96:5,7 120:21 148:22 149:6 168:16 179:12 190:1 193:19 276:8 <b>hope</b> 136:7 144:22 153:11 158:8,11 169:12 220:11 243:6 <b>hopefully</b> 145:13 187:3 188:15 189:14 192:13 <b>hoping</b> 119:9	220:14 <b>Horticultural</b> 98:11 <b>Horticulturalist</b> 98:8 115:10 <b>Horticulture</b> 115:11 <b>hour</b> 206:17 207:1 207:3 <b>hour's</b> 207:2 <b>housed</b> 8:20 <b>housekeeping</b> 76:5 <b>huge</b> 69:13 101:15 156:3 211:3 217:9 220:2 <b>hundred</b> 75:8,12 212:7 <b>hurt</b> 102:16 103:6 160:11 186:18 <b>hurts</b> 106:18 <b>H-a-c-k-e-r-t</b> 164:22 <b>H-e-d</b> 9:2 <b>H-e-d-i-n</b> 8:17 223:15 <b>H-i-l-l</b> 8:6 <b>h-w-e-l-l</b> 115:17
<b>I</b>				
			<b>idea</b> 89:21 143:10 215:4 <b>identical</b> 101:18 <b>identification</b> 15:7 25:11 164:14 224:5 <b>identify</b> 6:16 9:12 <b>imagine</b> 38:13 <b>immediate</b> 219:16 <b>immediately</b> 99:14 <b>impact</b> 56:14 69:13 77:3,9 106:12 135:17 147:7 159:3 161:11 167:6 190:12 201:3,7 218:22 219:4,5,17 230:16 234:10 236:15	

239:4 248:16 263:6 264:6 269:14 <b>implement</b> 117:16 <b>implementation</b> 40:7 173:21 <b>implemented</b> 120:5 216:15 218:17 219:15,18 220:6 228:7 266:2 274:8 <b>importance</b> 245:4 <b>important</b> 59:12 107:12 134:12 177:20 187:5 199:9 245:6 264:13 268:11 271:2,5 276:11 <b>importantly</b> 266:8 <b>impractical</b> 44:12 46:13,21 <b>improve</b> 30:1 39:3 40:5 73:5 74:9 107:9 228:13,15 273:4,14,20 <b>improved</b> 108:21 109:4 <b>improvement</b> 27:15 <b>inadequate</b> 264:17 <b>incentive</b> 122:13,17 151:22 154:12 185:12 197:7 248:7 <b>incentives</b> 267:19 <b>inception</b> 26:16 223:18 <b>inches</b> 131:21 <b>inclined</b> 240:7 266:13 <b>include</b> 17:1 31:13 45:16,16 67:14 114:19 231:18 241:5 247:14 254:1 <b>included</b> 67:17 90:5 114:21 129:15 145:11	230:15 252:16 255:2,14 <b>includes</b> 85:1 142:19 232:5 254:9 <b>including</b> 108:14 228:11 <b>incorporate</b> 237:5 243:15 <b>incorporated</b> 151:9 151:11 152:10 196:3 198:10 230:1 236:18 248:19 251:15 254:5 <b>incorporates</b> 248:18 <b>incorrect</b> 87:7 <b>increase</b> 27:1 32:21 42:3,4 56:20 57:1 58:12,14 59:18 73:7 89:21 101:15 101:19 112:21 130:8 154:17 161:18 168:3 183:21 214:18 232:14 257:19 258:2 262:21 266:3 269:18,21 272:5 273:1 <b>increased</b> 30:11 41:14 69:21 78:9 80:5 101:13 130:14 176:14 237:14,18 239:2 242:2 258:10 269:9,18 272:18 <b>increases</b> 30:14 31:8 32:16,17,20 45:2 92:3,5 230:11 237:9 242:14 264:21 265:6 268:9 <b>increasing</b> 42:6 176:20 262:17 268:9 270:12 272:14	<b>incur</b> 129:10 160:21 168:5 215:3 <b>incurred</b> 162:2 <b>incurring</b> 154:6 <b>independently</b> 22:13 <b>Indian</b> 200:16 <b>Indiana</b> 176:8 <b>indicate</b> 108:19 <b>indicated</b> 23:8 56:16 157:5 <b>indicates</b> 104:7 243:1 <b>individual</b> 31:21 75:16,18 117:8 217:11 226:8 <b>industries</b> 122:18 <b>industry</b> 2:14 3:18 8:10,19 15:16 28:5,7 29:14,18 30:22 31:2 39:15 41:1,9 43:8,20 45:12 47:20 65:13 66:1,19 67:21 68:13 69:16 73:16 73:16,20 75:3 98:16 102:13 104:21 107:16 109:9 110:6,10 114:8,11 116:9 118:1,6,8,14 120:4,8 123:6 126:5 132:11 135:15 139:14 142:19 157:1 167:7 177:6,12 178:12 187:6 193:2,5 198:19 202:6 208:21 218:2 223:16 226:9 227:13 228:7 229:11,17 230:14 239:6 245:6 247:5 255:9 258:19 259:7,19 262:16 265:14	267:5 270:6 272:16 273:22 274:2,9 <b>industry's</b> 235:21 259:1 271:10 <b>industry-wide</b> 29:6 <b>inequity</b> 39:7 <b>influence</b> 138:19 269:17,19 <b>influences</b> 112:3 128:14 <b>informal</b> 30:2 42:15 <b>information</b> 3:17 15:15 17:21 22:9 22:13,19 41:16 75:1,8 98:21 137:21 138:18 140:4 141:10 213:9 223:21 225:20 241:21 243:1 270:8 <b>informational</b> 241:18 <b>initial</b> 29:21 52:10 52:10 57:10,18 79:14 <b>initially</b> 27:14 45:21 46:6 62:17 117:14 <b>injure</b> 215:10 <b>input</b> 69:22 <b>instances</b> 243:10 253:1 267:12 <b>institute</b> 114:5 116:14,20,22 117:12 118:18 140:3,7 142:3,7 208:20 <b>intended</b> 17:22 30:16 31:10 45:21 203:2 229:12 234:7 <b>intent</b> 46:5,5 63:4 67:20 210:21 <b>intention</b> 52:8 <b>interaction</b> 233:18	<b>interest</b> 215:2 245:14 262:1 270:6 <b>interested</b> 10:16 116:16 <b>interesting</b> 99:18 101:6 <b>interestingly</b> 111:21 <b>interject</b> 227:21 <b>international</b> 228:18 <b>interplay</b> 268:1,20 <b>intertwined</b> 211:22 <b>intervals</b> 105:6 <b>introduce</b> 17:20 <b>inventories</b> 28:17 <b>inventory</b> 28:6,15 41:1 42:22 43:9 73:17 74:3,4 190:18 191:8 219:17 235:3,4 240:8 241:5 244:6 244:10 246:16 247:3,6,8 260:19 261:8,13 262:16 262:19 263:5 <b>inverse</b> 19:18 44:22 266:20 269:4 270:19 <b>inversely</b> 273:6 <b>Investment</b> 6:21 <b>invite</b> 23:22 <b>involved</b> 10:13,14 18:1 167:19 200:16 <b>involving</b> 4:17 <b>in-depth</b> 111:11 <b>in-house</b> 175:7 <b>in-orchard</b> 94:8 154:1 155:4 166:12 167:22 168:4 229:7 230:4 230:8,18,19 232:13 233:19 236:16 237:11 240:5 242:7,13,20
--	--	--	--	--

243:10,16 244:17 245:11,17 246:3,9 248:15 250:16 251:10 252:14 265:6,10 266:3,9 267:4 268:14 269:2,19 273:13 <b>issue</b> 63:7 99:12 125:12 132:10 146:5 166:1 198:17 201:17 211:11,12 270:4 270:16 <b>issued</b> 51:3 146:1 232:6 252:13 <b>issues</b> 4:16 10:22 17:6 198:20 231:7 235:16 <b>item</b> 32:5 89:5 254:6 <b>it'll</b> 120:16 125:12 170:11 172:3,4 176:2 183:21,22 189:20 211:19 219:4,12 274:19 <b>I'm</b> 148:9 <b>i-n</b> 9:2 <b>i-s-a</b> 6:11	136:3 157:22 158:2 183:5,7 217:17,19 227:4 <b>Johnson's</b> 191:20 <b>judge</b> 1:21 4:3,13 5:19 6:2,13 7:7,12 7:17 8:1,12,15,22 9:4,17 10:1,6 11:1 11:3,12,18,20 12:2,10,14,22 13:2,6,9,13,17,20 14:4,7,16,19 15:1 15:4,8,12,18 16:2 18:11,16,19,22 19:22 20:6,7,10 20:20 21:2,7,17 21:21 22:2 23:4 23:17 24:6,10,16 24:20 25:2,7,12 25:22 42:9,17 47:5,9 63:11,14 67:8 71:10 72:13 74:11,14 75:22 81:14 82:7,11 83:9,15,18 85:9 85:13,16,21 86:2 86:10,19,22 87:3 87:8,12,22 88:5 89:12,19 90:14,21 91:9,11,21 92:19 93:3,7 95:9,12,19 95:22 96:9,12,15 96:20 97:6 113:7 116:2 118:20 121:1,7 123:14 129:2 136:1 137:15 141:8,13 143:17 144:5,11 145:8 146:12 147:10,16,20 148:1,11,20 149:2 149:9,12,18 150:6 150:10,18 153:15 155:19 156:13,16 157:21 158:20 159:14 161:6 162:15 163:11,16	163:22 164:3,7,15 165:1,8 166:19 168:13 179:13,20 180:11 181:10 183:5 184:14 186:5 188:2,10,18 189:1,3 190:3 191:10,22 192:5 193:6,10,13,17 194:2,7,13,16,19 194:22 195:5,11 195:18 200:5,19 202:11,21 203:3 203:10,19 204:3,6 204:11,17,22 205:4,7,12 206:1 206:6,9,14,18 207:3,7,11,16,19 208:4 216:7 217:16 218:10 220:7,9,16 222:1 222:9,12,21 223:5 223:8,11,19 224:1 226:10,14,16,19 249:1,5,13,21 250:3,7 253:15,20 256:11,16,19 257:3 271:18 274:11,18,22 275:7,9,16 276:2 276:5,9,14 <b>juice</b> 118:11 135:3 135:5,5 199:7 220:21 221:13 <b>juicing</b> 221:16 <b>July</b> 16:19 191:16 192:1 204:1,4 205:17 236:22 237:4 <b>jump</b> 225:18 <b>jumping</b> 187:14 <b>June</b> 52:15 68:8 235:19 237:4,9 251:4,20 252:3,4 <b>justifiable</b> 103:5 <b>justify</b> 123:11 <b>J-a-m</b> 96:18	<b>J-a-m-e-s</b> 145:3 <b>J-e-n-n-i-e</b> 7:3 <b>J-o-h</b> 6:19 <hr/> <b>K</b> <hr/> <b>keep</b> 33:2 144:8 148:14 156:9 274:12 <b>keeps</b> 191:2 <b>Ken</b> 136:7 227:1 258:14 274:5 <b>Kenneth</b> 2:8 6:19 <b>kept</b> 28:12 <b>key</b> 117:22 120:4 243:7 <b>kind</b> 42:13 77:8 121:4 125:7 126:3 127:5,18 133:4,20 134:9 135:10,12 159:2 180:19 215:15 218:22 <b>kinds</b> 10:22 <b>Kissler</b> 165:15 <b>know</b> 22:18 31:4 46:19,20 47:17 50:21 51:16 52:3 53:11 54:8 55:10 56:1,4,5,16 58:1 59:9 68:7,16 70:20 71:15 77:17 78:19 85:20 86:3 86:9 88:2 94:14 94:22 115:17,18 116:19 122:10 123:7 124:9,13 125:17,19 128:11 132:17 135:12 140:8 146:17 148:3 156:3 169:4 171:15 173:11,18 174:9,18 175:12 175:13,22 176:17 176:20 177:15 178:12,22 179:1,9 180:21 181:15 185:5,17,21 186:11,16 187:8	187:12,21 189:14 190:15,19 191:1,7 191:18 192:10,14 192:20 193:19 195:1 198:17 199:13 202:22 203:11,15 205:8 206:19 210:4 211:17 212:8 213:11 214:5 215:21 218:3 219:3 220:8,19 221:4 222:6,13 239:8 248:20 251:20 252:6 262:7 266:9 275:14 <b>knowing</b> 57:11 170:8 266:13,15 <b>knowledge</b> 66:14 <b>known</b> 56:4,6 122:3 126:4 134:2 178:9 189:6 229:3 246:6 252:10 273:22 <b>knows</b> 127:18 166:21 204:13 237:1 <b>K-e-n-n-e-t-h</b> 6:19 <hr/> <b>L</b> <hr/> <b>labels</b> 227:2 <b>lack</b> 118:6 <b>lady</b> 25:4 <b>land</b> 70:1 109:15 109:16 110:8 <b>laptop</b> 85:12 <b>large</b> 17:5 29:16 31:3 37:17 40:12 53:17 54:1 57:11 62:15 67:4 73:6 74:4 75:21 77:19 77:19 80:6 90:18 99:9,19 102:17 104:11,18 106:6 107:13,13,14 119:15,17 121:11
--	--	--	---	---

125:15,20 128:14 129:8 130:2,14 131:4 133:2 134:4 151:12 152:2,3 159:1,3,4 166:11 167:6,10 175:20 175:20 182:5 183:1 185:5 186:20 190:12 198:12,14 199:17 202:15,17 206:20 212:5 230:10 240:1,18 242:6 265:8,12 266:1,4 268:20 269:6	<b>legible</b> 9:10 222:16 <b>length</b> 248:13 <b>lengthy</b> 224:19 <b>lessen</b> 246:9 <b>lessened</b> 245:4 269:8 270:21 <b>lessons</b> 176:10 <b>lest</b> 158:12 <b>letter</b> 3:22 224:11 <b>letterhead</b> 148:16 149:21 <b>let's</b> 8:2 20:10 42:10 58:10 82:12 87:9,12,17 96:12 123:9 153:15 168:13 194:7 195:2 213:3 220:7 223:8 249:7 276:9 <b>level</b> 31:12 121:22 154:21,22 155:13 192:20 266:4 <b>lieu</b> 244:9 <b>life</b> 32:9,14 43:6,8 44:12 104:20 <b>light</b> 243:17 <b>likelihood</b> 273:15 <b>likes</b> 239:7 <b>limited</b> 33:3 43:8 154:4 265:18 <b>limiting</b> 78:5 <b>line</b> 33:1,3 41:9 84:6 89:5 93:20 103:15 119:3 123:19 125:6,7 126:1,2 151:19 152:9 153:1 166:5 167:11 168:1 169:13 170:9 172:17 173:14 174:18 184:22 202:16 213:14 214:19 230:18 248:15 254:6 273:4,12 <b>lines</b> 33:3 190:7 <b>little</b> 24:18 33:2,17 41:19 42:2 43:1	44:18 51:22 56:13 58:14 67:5 74:7 85:17 86:20 90:10 90:19 92:8,8 97:19 113:15 121:2 148:5 153:3 168:21 175:10 186:12 193:20 194:8 195:22 208:12 211:5 215:8 223:2 256:7 268:14 275:13 <b>live</b> 180:19 213:12 <b>lived</b> 104:20 <b>locally</b> 200:17 <b>located</b> 151:9 217:12 <b>locations</b> 4:10 <b>logic</b> 265:22 267:15 <b>lone</b> 26:13 <b>long</b> 52:14 78:21 104:22 105:7 109:8 110:5 120:17 123:9 176:12 206:11 211:2 274:18 <b>longer</b> 139:7,15 219:14 <b>look</b> 15:19 16:3 20:11 31:18 33:7 62:11 85:6 91:5 92:4 100:22 103:18 105:3 108:22 112:18 120:19 127:3 133:12 165:22 170:18 190:6 202:8 242:10 258:15,20 265:4 271:6,15 272:19 <b>looked</b> 99:12 102:10 138:11 142:16 <b>looking</b> 55:3 56:4 79:5 84:1 104:19 111:12 112:17 114:18 220:1	254:21 262:22 <b>looks</b> 178:14 249:9 <b>lose</b> 215:21 <b>losing</b> 179:3 <b>lost</b> 83:6 103:8,8 104:8 113:1 <b>lot</b> 46:21 48:1 51:19 75:11 113:1 120:6,17 122:9 127:14 129:22 135:3,13 136:20 168:8 170:7 172:16 173:11,12 174:20 175:4 176:10 178:20 179:4 189:13,21 192:10 209:15,16 213:20,20 215:18 217:7 218:5 <b>love</b> 206:4 220:9 <b>low</b> 19:4,8,12,16 28:16,18 48:15 51:21 52:12 104:3 107:8 113:3 122:12 134:4 154:5 160:15 214:16 <b>lower</b> 29:15 52:1 66:12 93:13 214:6 217:3 <b>lowering</b> 153:9 <b>lowest</b> 78:7,8 <b>Ludington</b> 165:15 <b>lug</b> 131:20 <b>lugs</b> 132:2 <b>lunch</b> 194:1,10 203:11 206:11 <b>l-e-r</b> 6:5 <b>l-m-e-n-g</b> 207:17	<b>majority</b> 66:8 274:2 <b>maker</b> 4:16 <b>makeup</b> 75:3 <b>making</b> 4:7 30:2 43:16 110:4 234:5 241:1 251:19 <b>manage</b> 186:1 196:4,19 198:15 199:18 <b>manageable</b> 107:15 <b>management</b> 17:8 117:18 196:1 <b>Manager</b> 6:22 <b>managing</b> 197:2 <b>mandate</b> 259:4 <b>mandated</b> 238:5 <b>manner</b> 27:3 36:20 41:16 229:15 247:2 248:1 274:1 <b>manufacturer</b> 103:14 <b>map</b> 48:21 49:3,5,6 49:6,12,22,22 <b>mapped</b> 49:21 <b>maps</b> 48:19 <b>Marc</b> 2:10 3:3 7:18 11:2,10,14 15:3 16:15 76:3 146:15 161:9 <b>March</b> 10:11 <b>margin</b> 29:19 <b>mark</b> 148:21 164:11 181:13 243:6 <b>marked</b> 12:9,20 13:15 15:2,5,7,16 20:13,16 25:10 97:14 151:3 164:14 188:14 224:4,8 <b>market</b> 26:11 27:18,19 28:3,12 38:20 41:3,4,5 43:9 58:18 59:2,4 59:13 60:3,10 61:4 70:17,18
<b>M</b>				
<b>M</b> 2:9,18 141:16 <b>Mailing</b> 3:15 13:12 <b>maintain</b> 185:14 <b>maintaining</b> 244:9 <b>major</b> 18:5 77:13 134:21 245:3				

78:18 85:1 86:6	186:21 196:12	11:10 76:2	65:14,16 66:6	<b>middle</b> 91:5,8
89:17 99:3 100:9	197:10,11,17	<b>McFetridge</b> 3:3,17	171:16 173:15	92:16
102:22 103:12,13	201:15 208:20	7:19 11:2,11,14	<b>meetings</b> 65:20	<b>Midwest</b> 213:5
104:8 118:9,13	227:14 228:13	15:3,9 16:4,9,15	66:1,3 173:12	<b>mid-nineties</b> 70:4
119:22 124:7	229:2,5,9 230:7	18:13 22:7 23:22	<b>member</b> 26:16,17	<b>mid-size</b> 111:20
127:17,18,20,22	240:16 245:13	24:8 75:22 76:3	116:11 151:14	112:12
128:5,19 133:11	248:8 269:14,22	146:12,14,16	156:21	<b>million</b> 19:8,9 32:4
152:14 153:7	270:2,4,7,10,18	161:6,8,9 181:10	<b>memorialized</b>	32:7,11 33:5,8,9
167:17,20 169:11	271:7 272:2,7,17	181:12,13 271:22	225:2	33:11,21 34:4,7
169:20 170:17	273:12,14	<b>mean</b> 23:10 43:2	<b>mention</b> 110:14	34:10,14,15,17,18
171:6,7 172:5	<b>marketplace</b>	46:10,14 52:14	129:11 141:21	34:19,20,21 35:14
174:11 177:3,19	169:21 233:1	55:3,5,12,16	258:12	35:14,16,17,22
180:12,15,20,22	273:9	58:17 62:8,14	<b>mentioned</b> 9:5 34:3	36:4,13,17 37:3,4
190:21 201:12,12	<b>marketplaces</b>	71:19 75:9,15	34:12 35:3 36:13	37:8,9,11,12
214:9 215:4	228:18	78:12 86:11 94:15	45:4,19 54:2 66:9	38:15 43:10,14
216:18 221:4	<b>markets</b> 29:4	102:10 110:17	67:13 71:14 80:12	52:21,22 53:5
228:22 229:1	102:16 103:7,8	118:4 121:5,20	104:2 107:17	55:7,15 59:1,3,7
233:2,4 245:8,9	118:10,17 120:3	123:20 128:12	121:16 129:7	60:15,16 76:9
258:11,21 259:3,8	123:10 177:19	131:8 134:8	133:9 143:2 155:3	79:9,19,20 80:1,1
259:15 260:15,15	220:22 244:12,13	156:22 176:3	159:7,8 174:8,9	80:6,7,10 84:8,12
261:2,2	245:2,20 255:5	180:5 182:3 184:3	184:17 198:17	88:19,22 90:11,12
<b>marketable</b> 52:3	268:16	186:17 187:13	211:10 216:12	91:4,16,18,19
<b>marketed</b> 27:17	<b>marking</b> 25:8	204:20 220:1	247:12 264:7	92:2 94:7,17
39:18 245:21	<b>Martin</b> 2:6 6:3	253:7	<b>mentioning</b> 274:3	99:22 100:3,5,14
<b>marketing</b> 2:2 5:17	205:10 257:21	<b>meaning</b> 234:6	<b>merits</b> 10:15 18:2	100:21 101:2,8,8
6:6,6,12,20,21 7:1	<b>Maryland</b> 7:16	<b>means</b> 10:17 34:21	<b>mess</b> 144:22	102:4 103:22
7:4,6,20 8:8 10:9	<b>Mason</b> 165:17	49:11	<b>met</b> 233:16	104:1,3,5,5,7,15
16:18 17:6 26:12	196:3	<b>meant</b> 23:10 192:4	<b>method</b> 29:7 40:2	105:8,21 106:11
26:21 27:7,11,13	<b>Master's</b> 17:9	205:3	78:4 172:15	106:13 124:18
28:21 29:13,18	<b>material</b> 138:9	<b>measure</b> 271:6	<b>mic</b> 249:2,6,7	125:1,1,18 127:2
30:6 31:11 39:3	<b>materials</b> 144:8	<b>mechanical</b> 131:13	<b>Michigan</b> 1:6,13,22	176:17,21 181:21
40:4,7,16 41:11	249:22 271:21	152:18 160:1,5	4:6 5:4 8:20	182:7,13 242:4,5
52:15 59:14 63:3	<b>math</b> 55:21 79:20	<b>mechanically</b>	14:13 98:1,2,5,7	242:6,7 250:10,14
63:20 69:15,17	124:22	131:11	98:11,12,15,17	250:17,21 251:1
71:8 89:15 99:3,5	<b>mathematical</b>	<b>mechanism</b> 28:13	106:22 107:2	251:18 252:12,17
99:15,17 100:19	257:19	48:11 49:9,17,18	111:5,10,13,13,14	252:19 253:5,6,8
101:4,20 102:1	<b>mathematics</b>	50:7,10 232:19	111:15 112:10	253:9,11,16,18
108:20 114:5	257:13	<b>mechanisms</b> 48:12	114:4 115:6,10	254:4,7,13 255:1
116:14,20,22	<b>matter</b> 8:11 59:9	65:1,10 228:19	117:13 139:8	255:10,13 256:3,5
117:11 118:17	60:5,13 83:2	<b>mechanized</b> 132:4	144:18 151:10	256:8 257:5
142:2,7 146:4	130:22 131:5	<b>medium</b> 33:16	165:15 186:13	259:10,11,14
151:11 166:2	238:19 240:4	267:2,15 268:19	192:15 196:7	260:8,14,20 261:5
168:10 169:2,6	<b>mature</b> 171:6	<b>meet</b> 35:1 38:7,8	200:9,14 208:15	261:9,19 262:3,18
170:7 172:7 173:2	<b>maxed</b> 261:19	46:1 51:6 155:12	208:19 209:1	262:20 265:9
174:13 176:19	<b>maximize</b> 261:21	160:8 244:18	227:18 228:1,2,3	267:3
177:6,12 178:16	<b>maximum</b> 29:5	266:7,19	228:3	<b>millions</b> 99:21
184:9,10 185:9	<b>MC</b> 2:10 7:18	<b>meeting</b> 23:19	<b>mid</b> 111:16	123:11

<b>mind</b> 81:20 141:5 143:22 202:16	163:20 189:7 200:4 216:2 233:3	<b>necessary</b> 38:8 225:1 229:19	26:13 29:4,4 32:7 34:16,21 35:9	10:10,12 12:6 41:18 80:4 94:21
<b>minimized</b> 263:13	235:12 255:5	<b>need</b> 9:9 10:3 11:22 15:19 36:11 40:9	36:10 42:1 43:16 77:14 78:15 81:4	143:8,15,19 144:6 144:14 145:9,11
<b>minus</b> 88:18	265:16	41:20,22 44:15 55:15 56:10 83:12	93:15 94:9,20 95:2 99:4 110:4,6	275:14
<b>minute</b> 57:4 58:11 81:15 85:18	<b>moved</b> 244:12	86:19 132:6 134:16 143:16	117:12 119:22,22 123:1 124:2,7	<b>notified</b> 14:15
101:13 195:3	<b>movement</b> 141:2 142:13,15,17,18	146:7 148:7,9,14 165:22 177:12,13	127:8 133:11,11 142:20 146:9	<b>notwithstanding</b> 204:2 250:11
<b>minutes</b> 82:5 87:18 206:13 269:3	<b>moving</b> 118:12 228:21	179:5,6,7 186:11 187:6,15,17 192:7	152:13,13 153:6 166:8 173:12	<b>November</b> 3:22 224:11 237:3,6
<b>missed</b> 84:5	<b>MSU</b> 98:8 142:1	192:22 197:9 205:16 210:6	176:7 198:19 199:22 221:4	<b>Nugent</b> 3:5 96:6,7 96:11,18,18 97:2
<b>missing</b> 13:8	<b>multiple</b> 133:14	266:6 268:7,8	227:18 244:13 259:13	97:10 116:3,4 123:18 129:3,7
<b>mistaken</b> 86:6	<b>multiplying</b> 271:11	<b>needed</b> 29:11 34:3 37:6 38:14,16	<b>news</b> 149:22 <b>nickel</b> 55:19,22	137:18 142:9 144:2,20 145:3,17
<b>mis-spoke</b> 227:11	<b>M-a-r-c</b> 7:19	92:3,9 148:6 178:21 196:15	<b>nickname</b> 8:13 <b>Nicole</b> 144:21	146:15 147:11,11 147:14 154:16
<b>Mm-hmm</b> 151:5	<b>M-a-r-t-i-n</b> 6:4	<b>needing</b> 239:13 <b>needs</b> 12:5 34:13	145:6 <b>Nikki</b> 115:8,8,13	158:15 161:16 204:19 205:1,5,6
<b>MOAB</b> 63:20	<b>M-c-F-e-t-r-i-d-g</b> 7:19	34:13 164:17 176:3 177:6	145:4 115:13,16 144:21	263:11
<b>model</b> 120:19 244:2		186:20,20 229:11 230:12,13	<b>non</b> 197:22 270:9 <b>non-citrus</b> 139:21	<b>number</b> 10:10 49:7 49:8 53:1 57:20
<b>moderate</b> 103:21 119:18 125:14	<b>N</b>	<b>negative</b> 167:5 183:14	142:12 <b>non-regulated</b> 33:20	57:22 58:22 59:10 60:4,5,9,14 68:11
267:3,5	<b>name</b> 4:12 5:14,21 5:22 6:3,10,11,19	<b>negatives</b> 192:17 <b>neighborhood</b> 122:5 206:19	<b>norm</b> 174:2 <b>normally</b> 7:9 127:5	88:11,13,16,16 89:8 95:4 115:20
<b>modifications</b> 29:22	7:3,18 8:5,6 9:1 11:9,10 16:15	<b>net</b> 101:4 134:6 234:21 235:6	<b>north</b> 29:2 213:21 216:2	115:21 132:10 133:6,18 143:5
<b>moment</b> 20:11 216:11 223:9	25:13,15 26:9 63:19 96:17	237:18 238:14 258:17,20 259:1	<b>northwest</b> 98:2,5 98:11,14,16	144:7,17 148:5,5 148:13 196:20
<b>money</b> 119:10 121:21 122:18	115:15 145:1,2,3 145:4,6,7 148:17	259:16,17 <b>netting</b> 100:13	106:21 107:2 111:10,14,14	209:13 213:3 218:5 219:21
134:6 155:12	150:1 164:20 172:22 198:8	<b>neutral</b> 17:13 23:9 23:11,12,15	112:10 115:10 228:2	224:9,10,12 225:5 226:7 229:10
158:8 175:1,4,6	207:13 223:13,14	46:8,9 50:18 103:7 104:22	<b>note</b> 141:6 232:4 233:8 236:9 264:1	226:7 229:10 242:1 244:19
180:6,7 185:13,16	<b>named</b> 180:4	120:14 139:17 163:6 186:16	<b>noted</b> 243:9 245:7 245:8 246:2	250:20 256:6,13 256:16 258:13
185:18 187:7	<b>names</b> 5:20 9:9 145:1 195:8	189:5 236:4 250:12 258:17	<b>notes</b> 85:8 <b>notice</b> 1:17 3:14,16	259:17 264:5 <b>numbers</b> 5:1,6,7
209:14 210:1,14	<b>Nancy</b> 9:3	<b>new</b> 1:6 5:4 14:13		18:19 20:3,15 44:20 69:9 75:11
210:19 211:2,5,6	<b>NASS</b> 22:9,15,22 23:1 270:8			84:14 85:5 88:14 95:7 100:6,11
214:14 216:21	<b>national</b> 17:17 33:4 36:14,21 75:17,20			106:9 148:7 177:5 178:7 184:20
221:9	84:7 88:18 114:12 117:1			187:9 224:3,14
<b>month</b> 156:9,13 191:4 264:3	<b>nationwide</b> 46:16 74:3 75:13			
<b>months</b> 32:9 42:22 43:6	<b>nation's</b> 107:1			
<b>morning</b> 4:5 5:13 6:9,18 7:2 8:16	<b>natural</b> 99:7			
47:14 63:17,18	<b>nature</b> 44:7 236:8			
76:4 146:2 186:14	<b>near</b> 98:2 249:1			
275:2,4,10	<b>necessarily</b> 71:1 109:12			
<b>motion</b> 192:19 274:4				
<b>move</b> 15:10 20:8 95:18 149:7				

251:4 252:4 260:3 260:11 <b>number's</b> 256:7 <b>Number(s)</b> 1:5 <b>nut</b> 270:9 <b>nuts</b> 142:13 <b>N-i-c-o-l-e</b> 145:7 <b>N-i-k-k-i</b> 115:16 145:4 <b>n-s-o-n</b> 6:20 <b>N-u-g-e-n-t</b> 96:19 145:3	<b>Odds</b> 204:15 <b>offer</b> 38:21 40:13 204:17 205:14 211:5 <b>office</b> 7:1,6 8:8 50:22 115:6,21 225:19 252:13 <b>officed</b> 7:9 <b>officer</b> 50:2,14,19 <b>officers</b> 49:15 <b>official</b> 8:4 143:7 143:15,18 144:6 144:14 145:9,11 <b>officials</b> 17:3 <b>offs</b> 136:11 <b>offset</b> 61:6 237:16 <b>oh</b> 9:15 13:16 23:2 70:15 81:5 85:1 85:13 190:15 192:6 198:9 227:10 249:6 250:5 <b>okay</b> 7:17 13:11,14 18:16,22 22:17 26:9 47:22 48:9 51:8 54:10 56:10 57:3 62:22 63:22 64:14,14,21 65:8 65:11,21 67:7 68:14,14,17 71:5 72:1 74:10 80:3 80:14 81:10,12 82:8 85:4,13 86:1 86:14,22 87:8,11 87:20 88:2 90:21 91:9,21 94:10 96:12 97:13 124:17 126:6 132:21 137:12 138:1 148:8 151:7 157:4,11,20 161:2 163:6,10 167:1 168:8 169:9 182:6 182:12,17 188:10 188:13,15,18 189:1 191:17 192:6,7 202:10,21	205:7,7 206:14 207:1 209:4 220:12 223:5 225:15,18 249:13 249:16 253:19 256:11 257:3 274:19,21 276:2 <b>old</b> 109:20 166:2 172:6,8,10,11 175:11 265:3 <b>Olynk</b> 144:22 145:6 <b>once</b> 124:5 169:8 175:19 225:7 260:3 <b>ones</b> 170:18 213:7 226:8 275:17 <b>one's</b> 200:1 <b>one-half</b> 233:13 <b>open</b> 47:10 178:13 178:14 <b>operate</b> 78:17 165:16 196:1,3 240:16 247:11 252:4 <b>operated</b> 197:19 228:10 <b>operates</b> 168:11 247:15 251:12 252:10 <b>operating</b> 246:2 <b>operation</b> 76:12,13 77:9 78:22 191:14 196:7,19 197:4 199:12 200:4 217:11 228:8 230:17 245:13 <b>operational</b> 114:10 <b>operations</b> 111:20 111:21 182:2 <b>opinion</b> 58:5,6 66:18 72:20 103:4 104:9 145:22 154:16 197:9 205:15 <b>opportunities</b> 214:9 221:1,12	265:17 <b>opportunity</b> 37:7 67:5,6 221:19 231:1 <b>opposed</b> 201:20 <b>oppositions</b> 66:15 <b>optimal</b> 151:20 <b>optimum</b> 230:1,17 232:12,18 <b>option</b> 35:11 37:2 51:17 55:14 82:19 93:14 134:1 170:13,14 171:3,4 171:6 240:9 275:13 <b>options</b> 35:2,6 51:16 82:18,20,21 82:22 91:1 102:18 119:21 135:7 171:7 173:4 243:18 244:17,22 245:10,15 263:3 <b>oranges</b> 103:11 <b>orchard</b> 29:9 30:14 31:9,13,21 33:15 36:6 37:1,22 40:10 44:16,18 45:8,17,20 46:8 46:13 48:6,18 49:20 52:9 78:4 80:5,17,22 90:19 92:10 94:18 100:22 101:3 108:1 109:19,20 110:1 119:6,12 134:2 151:18 152:16 153:22 154:14 159:21 162:7,22 165:20 175:17 196:2,15 216:13 221:15 229:14 231:2,6,10 238:3 240:3,20,21 241:2,12,14,17 242:12 245:20 246:1 248:7 252:2 252:5,18 254:4,6	254:15 255:1 260:12 261:12 263:17 264:18 265:1,5,21 267:20 269:11 273:16 <b>orchards</b> 48:21 49:2,3,7 110:6,8 152:15 172:10 198:9 247:19 251:19 252:7 257:18 <b>order</b> 6:6,12,21 10:10,10 16:18 17:6 26:12,22 27:7,13 28:21 29:13,19,22 30:1 30:6,21 31:11 33:6 39:3 40:4,7 40:16 41:11 43:10 45:2 46:11 48:10 48:11,22 52:15 59:14 61:12 63:3 63:20 68:20 69:15 69:17 89:16 99:3 99:5,15,17 100:19 101:4,20 102:1 108:20 135:14 146:4,8 151:11 152:7 166:3,3,6,8 168:10,11 169:6 172:7,8,11,13,13 172:14 173:12 176:12 177:7,12 178:6,10,16,18,21 179:1,2 191:13 196:14 197:10,17 227:14,22 228:6,8 228:9,20 229:2,5 229:7,9,21 230:8 230:12,22 231:5 231:12,17,22 232:4 238:5 240:16 243:20 245:2,13 248:8 256:9 261:11,18 269:14,17,22 270:3,4,7,11,18
--	---	--	--	--

271:3,7 272:2,7 272:17 273:12,15	<b>O-l-y-n-k</b> 145:7	261:6	<b>people</b> 6:14 9:7 20:11 23:21 52:8 66:9 77:16 93:9 116:3 120:16 149:20 154:20 176:13,18 192:22 193:3 198:15 249:8 261:16	132:13 136:14,16 151:22 152:4 156:4 161:18,19 172:2 180:2 199:2 211:22 218:18,19 218:21 219:8,9 230:10 233:5,8,21 235:17 236:6,13 236:15 237:9,13 239:1,4 240:1 257:8,20 258:16 258:17,18 259:18
<b>ordering</b> 178:22	<b>P</b>	<b>partial</b> 50:8	<b>perceived</b> 54:12	<b>percentages</b> 54:5 56:15,17 57:5 58:4 59:17 60:17 64:5,16 79:8 80:21 84:4 158:13 166:22 169:5,5 218:18 235:20,22 241:19 254:11
<b>orderly</b> 102:1 170:7 172:5 174:13	<b>pack</b> 119:20 124:6 159:12 185:2 214:5 274:20	<b>partially</b> 53:2	<b>percent</b> 18:10 29:18 30:7 31:5 34:1,6 36:16 37:18,19 38:12 45:20 46:1,8 48:17 49:12,13,16 53:12,12 55:22 58:19 59:15 60:1 60:1,2 75:17,19 75:20 79:11,13,18 79:22 80:2,9 84:12,13 88:13 89:14,17 91:13 92:1 94:22 106:14 106:19 107:1 124:13,14,19,20 130:15,16 132:12 142:14 166:14 167:3,3 176:1,19 178:7 210:5,9,10 213:3 234:14,17 237:14 238:8,20 241:16 256:9,12 257:11 259:7,16 267:13,14 272:5	172:2 180:2 199:2 211:22 218:18,19 218:21 219:8,9 230:10 233:5,8,21 235:17 236:6,13 236:15 237:9,13 239:1,4 240:1 257:8,20 258:16 258:17,18 259:18
<b>orders</b> 228:13	<b>package</b> 215:18	<b>participate</b> 23:21 32:11,13 35:4 64:3,6 66:11 154:13 175:17 229:6	<b>performed</b> 242:22	<b>period</b> 99:5,14,16 100:12 102:4,6,7 103:19 104:12,22 105:7 109:21 113:2 155:2 272:7 272:18
<b>Oregon</b> 1:6 5:5 14:13 17:9,11 188:16,22 227:18 233:10 252:22	<b>packed</b> 43:7 152:4 180:2	<b>participated</b> 152:11 216:13	<b>percentage</b> 28:3 29:17 30:11,14 31:8,17 33:19 36:15 39:16 41:19 45:12,14 52:16,18 56:20,22 58:12 60:5,13 64:20 67:15 68:2,8 79:10,12 80:11 81:8 88:9,20 90:6 91:13 92:7 94:9 94:20 101:18 125:11,16,21	<b>perception</b> 262:18
<b>organization</b> 117:1 173:15	<b>packet</b> 165:12	<b>participating</b> 5:10 64:12	<b>period</b> 99:5,14,16 100:12 102:4,6,7 103:19 104:12,22 105:7 109:21 113:2 155:2 272:7 272:18	<b>perfectly</b> 9:10 82:2
<b>original</b> 30:21 40:6 173:21 237:20 239:16 255:18	<b>page</b> 3:2,13 18:6 19:2,6,10,14,21 20:14 31:19 138:21 139:3,20 140:1 141:1 142:10 149:4 164:10 187:20,22 188:3,4,16,19 190:6,9 238:6 242:9 250:6,7 257:11 258:12 262:22 271:21 272:3,20,20	<b>particular</b> 111:11 140:14 142:10 152:19 160:2 196:22	<b>performed</b> 242:22	<b>period</b> 99:5,14,16 100:12 102:4,6,7 103:19 104:12,22 105:7 109:21 113:2 155:2 272:7 272:18
<b>originally</b> 30:16 31:10 61:19	<b>paid</b> 37:22 38:2 55:22 56:8 109:16 114:1,22 121:16 121:18 190:17 239:16 266:15	<b>particularly</b> 101:16 117:4	<b>permitted</b> 180:12	<b>periods</b> 99:2,18 100:17 101:9 272:6,11
<b>OSF</b> 230:2 232:19 239:20 247:15 248:16 251:4,12 253:4 254:15,20 254:22 255:7 257:17 259:21 264:21 267:17,21 267:22 268:6 269:14	<b>par</b> 70:11 72:19	<b>party</b> 10:16	<b>permanently</b> 8:20	<b>permit</b> 230:18
<b>outcome</b> 240:15 248:9	<b>paragraph</b> 23:8 159:19 235:13 257:10 263:1	<b>pass</b> 16:1	<b>permitted</b> 180:12	<b>Perry</b> 2:18 3:6 8:17 61:21 75:10 84:22 119:13 138:15 141:16 222:19 223:15 253:7
<b>outcomes</b> 228:20 271:3	<b>parameter</b> 91:3	<b>passed</b> 31:1 66:20 67:2 126:8 158:9 178:10	<b>permanently</b> 8:20	<b>person</b> 142:4 148:13 193:21 197:21
<b>outlet</b> 245:3	<b>parameters</b> 101:16 239:17	<b>passes</b> 124:1 154:11 192:20	<b>permanently</b> 8:20	<b>personal</b> 151:4
<b>outside</b> 29:2 157:17	<b>Parisa</b> 2:7 6:10 13:10 63:19	<b>patterns</b> 30:4	<b>permanently</b> 8:20	<b>perspective</b> 99:11 109:9 240:13,14 240:15 259:1
<b>outweigh</b> 183:14	<b>part</b> 10:4 17:5 31:14 50:9 61:7 68:13 71:6 84:9 109:5,12 114:9 117:14,15 120:7 134:10 146:4 159:11 183:17 186:21 231:19 232:7 239:20 252:16 255:18	<b>Patty</b> 258:14	<b>permanently</b> 8:20	
<b>overall</b> 137:8	<b>Parisa</b> 2:7 6:10 13:10 63:19	<b>pay</b> 55:19,20 77:22 113:20 114:9 180:7 189:13 210:7 211:7 214:20 264:12	<b>permanently</b> 8:20	
<b>overnight</b> 274:19	<b>part</b> 10:4 17:5 31:14 50:9 61:7 68:13 71:6 84:9 109:5,12 114:9 117:14,15 120:7 134:10 146:4 159:11 183:17 186:21 231:19 232:7 239:20 252:16 255:18	<b>payment</b> 36:8 47:1 198:21 200:3	<b>permanently</b> 8:20	
<b>overseen</b> 231:6	<b>parameter</b> 91:3	<b>payments</b> 40:14,18	<b>permanently</b> 8:20	
<b>overused</b> 177:17	<b>parameters</b> 101:16 239:17	<b>pdf</b> 115:14	<b>permanently</b> 8:20	
<b>overview</b> 77:8	<b>Parisa</b> 2:7 6:10 13:10 63:19	<b>penalty</b> 53:10 54:1 54:2,2,7,11,12	<b>permanently</b> 8:20	
<b>overwhelming</b> 66:7	<b>part</b> 10:4 17:5 31:14 50:9 61:7 68:13 71:6 84:9 109:5,12 114:9 117:14,15 120:7 134:10 146:4 159:11 183:17 186:21 231:19 232:7 239:20 252:16 255:18	<b>penalty's</b> 180:18	<b>permanently</b> 8:20	
<b>over-regulate</b> 62:2	<b>Parisa</b> 2:7 6:10 13:10 63:19	<b>pennies</b> 121:2	<b>permanently</b> 8:20	
<b>over-stressed</b> 267:9	<b>part</b> 10:4 17:5 31:14 50:9 61:7 68:13 71:6 84:9 109:5,12 114:9 117:14,15 120:7 134:10 146:4 159:11 183:17 186:21 231:19 232:7 239:20 252:16 255:18	<b>Pennsylvania</b> 1:6 5:5 14:13 227:18 233:11 253:1	<b>permanently</b> 8:20	
<b>owned</b> 185:12	<b>Parisa</b> 2:7 6:10 13:10 63:19	<b>penny</b> 264:2	<b>permanently</b> 8:20	
<b>owner</b> 77:1	<b>part</b> 10:4 17:5 31:14 50:9 61:7 68:13 71:6 84:9 109:5,12 114:9 117:14,15 120:7 134:10 146:4 159:11 183:17 186:21 231:19 232:7 239:20 252:16 255:18		<b>permanently</b> 8:20	
<b>owners</b> 196:5	<b>Parisa</b> 2:7 6:10 13:10 63:19		<b>permanently</b> 8:20	
<b>o'clock</b> 274:16 276:12	<b>part</b> 10:4 17:5 31:14 50:9 61:7 68:13 71:6 84:9 109:5,12 114:9 117:14,15 120:7 134:10 146:4 159:11 183:17 186:21 231:19 232:7 239:20 252:16 255:18		<b>permanently</b> 8:20	

263:18 273:2	246:17	198:14 200:1	<b>pound</b> 19:12 28:14	238:12 241:15,22
<b>perspectives</b>	<b>plant</b> 152:15	210:13 218:16	29:5,16 32:12	242:6,7 250:10,15
240:19	213:20	238:16,19 274:15	33:9 35:15 36:14	250:17,21 251:1
<b>pertain</b> 266:1	<b>planting</b> 110:5	<b>pointed</b> 51:15	36:17 37:9,11	251:18 252:12,20
<b>Peterson</b> 3:10	<b>plantings</b> 110:4	61:21 123:4	38:1,3,22 43:10	253:5,6,8,9,11,17
195:7,7,9,9,14,21	<b>plants</b> 214:2	<b>pointing</b> 249:2	43:14 52:22 55:7	253:18 254:4,7,13
200:6 201:2	<b>plastic</b> 187:12	<b>points</b> 39:4	68:22 69:1,6,7,13	255:2,11,13 256:1
202:12,13 203:5	<b>play</b> 139:19 185:6	<b>Poland</b> 181:2,3	79:9,19 80:1,8	256:3,6,8 257:5,6
206:7 226:6	268:11	<b>politically</b> 47:2	100:1,13 101:14	259:10,14 260:8
<b>philosophy</b> 201:21	<b>played</b> 251:11	<b>pool</b> 40:22 127:17	104:12 106:20	260:14,20 261:6,9
202:2,5	<b>please</b> 5:12,20 6:17	128:16 170:1,19	108:5,9,11 112:1	261:20 262:4,19
<b>phone</b> 115:20	9:1 11:8 25:14	176:18 179:17,22	112:8,16,20 114:3	265:9 267:4
275:22	75:2 82:8 87:18	180:3,4,12,15	114:7,13,14,15,20	271:12
<b>physically</b> 7:8,13	96:6,16 97:20	262:3	117:20 121:17	<b>PR</b> 183:14
205:22	115:15 126:17	<b>pools</b> 127:15	122:6 124:9,9,11	<b>practically</b> 143:21
<b>pick</b> 52:13 58:22	141:14 149:1,22	<b>poorer</b> 199:9	130:1,1,16,17	<b>practice</b> 259:12
74:8 131:19	150:12 159:18	221:13 242:18	131:4 152:8,9	<b>preceding</b> 127:13
170:21 197:5	165:2,13 195:7	<b>popular</b> 173:5	156:9,15,16	<b>precisely</b> 260:2
<b>picked</b> 131:12,20	198:7 200:21	<b>porpoise</b> 145:18	160:22 189:10,10	<b>precludes</b> 245:21
136:17 162:8	207:4,11,20 233:9	<b>portable</b> 249:7	191:6 197:7,7	<b>predicting</b> 250:10
<b>picking</b> 53:4 123:9	<b>pleased</b> 112:17	<b>portion</b> 37:21	211:8 230:20,20	<b>prefer</b> 11:5 119:20
<b>picks</b> 74:3	<b>plot</b> 198:16	46:17 51:11 60:20	235:1 242:4	<b>preliminarily</b>
<b>pies</b> 103:15	<b>plugged</b> 88:15	61:2 93:13 175:4	247:21,22 263:17	251:3
<b>pit</b> 132:9	<b>plural</b> 151:18	234:11 258:6	264:3 266:10,10	<b>preliminary</b> 52:16
<b>pits</b> 132:10,13	<b>plus</b> 33:4,9,10,11	<b>pose</b> 39:21	270:15 271:4	57:4 58:4 67:14
<b>pitted</b> 125:2	37:9 38:7,15 41:2	<b>position</b> 17:14	<b>poundage</b> 160:17	67:21 68:2,7
<b>pitters</b> 132:8	41:3 79:21,22	23:10,11,13,15	<b>pounds</b> 19:4,5,8,9	106:9 113:15
<b>place</b> 11:5 28:14	80:8 84:11 86:6	115:12 204:10	19:13 32:4,7 33:5	169:5 184:19
38:20 107:19	88:18 89:1,2,7,9	206:4 209:10	33:22 34:4,7,14	213:2 230:11
127:2,3 153:13	89:10,13 156:6	244:4 245:6	34:22 35:5,14,17	235:19 241:19
168:2 178:4 179:2	159:8 181:9	<b>positive</b> 184:3	35:22 36:4 37:3,4	253:3 260:11,22
203:14 248:20	185:15,15 254:13	192:14,16,16	37:9,13 38:15	<b>premature</b> 258:5
273:17	259:16	243:4	51:2 52:21 53:5	<b>premised</b> 243:14
<b>placed</b> 9:6 72:19	<b>pockets</b> 122:19	<b>possible</b> 62:7 78:21	55:11,12,15 59:1	<b>premium</b> 72:11
<b>places</b> 174:19	185:16	178:1 189:6	59:3,7 60:15,16	<b>prepare</b> 140:4
<b>placing</b> 244:6	<b>podium</b> 6:16	204:20 205:2,8,18	79:20 80:6,10	<b>prepared</b> 16:10
<b>plan</b> 103:3 133:20	<b>point</b> 18:8,13 46:12	205:22 275:5	91:17,18,19 92:2	17:15 26:5 97:15
169:2 170:7	48:7 61:10 83:14	<b>post</b> 244:10,16,22	99:21 100:3,5,14	97:16 141:22
174:13 175:16	91:16,18,19 92:4	245:18 246:4,18	100:21 101:8	225:14 228:5
176:19 184:9,11	92:6,6,12,14 95:3	260:13	103:22 104:1,5,5	234:9
185:9 186:21	95:5,5,6 100:12	<b>posted</b> 89:3 145:13	104:8 123:11	<b>preparing</b> 17:1
196:12 197:11	101:14 104:3	<b>post-harvest</b> 247:1	124:18 125:18	<b>present</b> 2:1 16:20
236:19 237:3,5	108:4 112:15	248:2	131:15 160:21	22:12 98:20
244:1 249:3	124:22 129:18	<b>potential</b> 43:13	176:22 210:4,6	139:16 197:12
<b>planning</b> 193:22	130:18 131:3	136:10 217:21	231:9,18 234:12	229:11 246:3,5
<b>plans</b> 32:11 133:8	147:13 166:17	220:1 246:11	234:13,17,20,22	248:8 269:13
239:18 241:7	167:4 169:17	<b>potentially</b> 83:3	235:8 237:19	<b>presentation</b> 271:8

<b>presented</b> 22:7 29:13 99:20 177:6 188:14	272:22 273:6	259:3 267:10	264:10	244:6
<b>presents</b> 171:14 237:22	<b>pricing</b> 27:11 28:20 29:15 73:3 74:5,6 74:9 140:6 188:1	<b>proceeding</b> 5:18	<b>processors</b> 36:7 106:1,4,16 114:9 119:8,9 121:18 123:7,12 124:4 133:8,10,13,14,19 135:15 137:1 157:15 166:2 171:5,10 174:20 177:1 184:8 189:16,22 196:7 213:21 214:19 229:3	<b>production</b> 19:7,15 19:20 27:8 28:16 36:17 41:8,12 67:17,22 68:4 69:4,6,7,10,12,19 70:7,14,19,22 71:16 99:21 101:16 103:20 109:11,13 110:15 111:5,6,10,12 112:4,6,8,12,22 113:3 114:17 118:2 128:18 131:3 139:2,7,22 144:18,19 187:9 227:17 228:16 230:7 233:15 234:13 235:21 236:1,3,4,12 247:17 251:13 252:17,21 253:3 254:3 256:21 257:1 272:10
<b>president</b> 151:8 171:17 190:16 196:9	198:22 262:18 269:15 270:17,21	<b>process</b> 10:14 34:4 35:17 48:4,8,9,10 49:4 51:7 81:9 123:10 124:17 153:12 169:3 171:18 172:21 225:7 230:5 240:7 246:20 248:11 252:17 254:3 264:19 265:13	<b>produce</b> 32:5 33:21 34:22 41:10 103:9 107:1 233:13	<b>productions</b> 109:8 111:7 113:4
<b>press</b> 3:14,15 12:19 14:3	<b>primary</b> 28:13 32:12 35:4 36:4 43:11,17,19,22 44:7 127:15 170:14,17,19 171:5 174:15 176:18 180:1,3,12 180:15 189:20 244:7 261:16,17 261:19,22 262:6	<b>processed</b> 35:19 105:19 173:8 226:1 231:21 247:3 254:10,12 256:22 263:20 269:7	<b>produced</b> 99:22 102:13 227:15 255:16,17,22 271:12	<b>products</b> 27:17 29:1,2,4 32:3,8,14 34:16 35:8,9 36:11 38:19 43:5 43:7,17,19 44:1 44:11 45:9 77:14 78:18 123:1 128:8 140:9 241:9 244:13,15 245:16
<b>pressure</b> 213:22	170:14,17,19	<b>processes</b> 45:10 48:13 209:1 231:11	<b>producer</b> 76:9 151:12 154:9 159:1 181:22 182:19 199:17	<b>product's</b> 53:20
<b>presume</b> 275:9	171:5 174:15	<b>processing</b> 44:11 100:4 101:5,7,17 103:9 104:4,6 105:20 123:11 142:17 159:10 163:7 174:6 226:2 228:16 232:3,17 234:17 242:18 245:22 246:12 254:2,10,21 255:20 268:17 269:12	<b>producers</b> 159:4 196:21 197:2 199:18	<b>profit</b> 155:14 185:14
<b>pretty</b> 101:15 130:20 131:1 180:9 187:10 203:20 222:6 260:6	176:18 180:1,3,12 180:15 189:20 244:7 261:16,17 261:19,22 262:6	<b>processor</b> 35:4 44:10 108:17 121:16 125:3 133:7,14,16,22 134:18 135:3,6,8 136:20 155:9,10 157:16 165:18 167:8,12,19 169:2 172:13,20 174:10 174:22 184:6,10 185:3,11 187:14 210:6,8,10,15,15 211:5 213:18	<b>product</b> 28:14 32:7 34:8,16,21,22 35:9 36:10,14,18 37:4 42:1 44:4,9 45:22,22 46:7 62:19 70:21 73:21 78:15 93:16 95:3 102:2 103:15 118:9 119:22 122:2 124:6 133:11 134:17 135:4,8,9 142:20 152:13,14 153:6 155:2 156:6,7,11 159:8 183:11,13 183:16 190:8 199:1 210:11	<b>program</b> 7:5,21,22 16:21 64:7,13 102:19 117:10 216:14 217:4
<b>previous</b> 105:15 112:19 158:14 241:6	<b>principal</b> 228:19 269:22		<b>product</b> 28:14 32:7 34:8,16,21,22 35:9 36:10,14,18 37:4 42:1 44:4,9 45:22,22 46:7 62:19 70:21 73:21 78:15 93:16 95:3 102:2 103:15 118:9 119:22 122:2 124:6 133:11 134:17 135:4,8,9 142:20 152:13,14 153:6 155:2 156:6,7,11 159:8 183:11,13 183:16 190:8 199:1 210:11	<b>programs</b> 6:21 17:4,5 117:5,8 263:7
<b>previously</b> 247:18 258:14 262:15	<b>print</b> 9:9			<b>prohibited</b> 10:15
<b>pre-harvest</b> 139:13	<b>printing</b> 222:16			<b>project</b> 252:2
<b>price</b> 19:20 70:18 70:18,21 71:15,17 72:6 100:11 101:10 104:11,14 106:8,15,17,19 112:19 113:11 122:8,12 127:6,6 127:7,19 128:1,8 128:15 134:4 140:8,12 142:11 155:7 168:3 183:20 188:17 199:3,5,5,7 214:6 214:16 266:22 268:18 270:15,20 271:4,11	<b>prior</b> 28:6 39:14 58:19 59:15 60:3 61:13,22 84:13 89:18 111:7 166:6 178:16 272:3			
<b>prices</b> 19:11 41:5 71:14 72:7 109:5 109:7 113:2 120:9 127:11 128:10,20 180:22 190:10,13 262:20,21 266:15 266:21 268:1,10 268:20 269:2,4	<b>privy</b> 75:1,7			
	<b>probably</b> 75:10 107:11 108:10 110:13 132:10 134:6 142:8 149:3 161:13 170:19 178:9 182:5 189:11 190:19 202:7,9 223:4 266:3 267:20			
	<b>problem</b> 39:5 52:5 56:12 86:4 166:11 171:14 204:12 219:13 221:21 235:15			
	<b>problems</b> 119:16			
	<b>procedural</b> 10:19			
	<b>procedurally</b> 58:7			
	<b>procedures</b> 231:4			
	<b>proceed</b> 10:5 11:19 16:5 26:1 83:7 194:1 208:5 224:1			

<b>projected</b> 84:8	<b>protect</b> 177:19 268:16	121:17,19,21 122:2 124:6,11,14 125:13 128:21 129:8 132:5 134:17 135:7,9,20 136:15 141:9 152:6,18 156:7 160:1 171:2 192:11 202:3,8 209:14 210:1,18 210:20 214:21,22 241:13 266:19 271:22 275:22	23:3,22 43:3 44:21 48:10 54:14 55:10 61:19 62:16 62:18,22 64:1,8 64:17 65:11 71:13 72:16 73:3 74:13 77:3 79:2 82:19 94:6 113:8 115:5 118:15 123:18 126:7,20 133:6 137:4,13 140:22 141:12 155:22 177:16 183:8 200:20 219:3 249:19 250:4	<b>quote</b> 232:3
<b>projection</b> 251:20 252:5	<b>provide</b> 28:9 70:13	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<hr/> <b>R</b> <hr/>
<b>promotion</b> 114:6,9 114:12 117:1,2 229:1 263:13	<b>provided</b> 116:7 223:20	116:9 138:17 142:6 191:13	<b>questions</b> 21:6,9,10	<b>R</b> 207:14
<b>prompted</b> 104:17 106:6	<b>provides</b> 54:15 240:1	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>raise</b> 71:2 96:21 141:13 150:12 165:2 207:20 208:16 210:20,21 211:19
<b>promulgated</b> 27:14 30:21 46:11 68:21	<b>provision</b> 259:4	116:9 138:17 142:6 191:13	<b>questions</b> 21:6,9,10	<b>raises</b> 81:20
<b>promulgation</b> 30:5 178:6	<b>Provo</b> 4:11	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>random</b> 48:15 49:10,11 172:15 173:3,5
<b>pronounce</b> 148:17	<b>prudent</b> 269:10	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>Randy</b> 3:11 207:10 207:14,22 212:19 216:6 220:19 236:20 251:17
<b>pronounced</b> 150:7 269:16	<b>public</b> 23:19	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>range</b> 108:12 264:3
<b>proof</b> 28:9	<b>publication</b> 22:22 145:9	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>ranged</b> 267:13
<b>pronounced</b> 150:7 269:16	<b>publications</b> 22:16 145:10 270:9	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>ranked</b> 138:6
<b>proper</b> 232:21	<b>publicity</b> 183:12,18 184:2	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>ranking</b> 138:5
<b>properly</b> 20:16 231:7	<b>published</b> 10:11 12:7 26:22 110:19 116:9 138:17 142:6 191:13	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>Rapids</b> 1:13,22 4:6
<b>properties</b> 196:4 196:20	<b>publishes</b> 116:14 138:15	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>rare</b> 178:2
<b>proportionally</b> 267:18	<b>purchase</b> 32:3 35:7 35:9 38:18,19,21 43:15 70:21	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>rate</b> 104:3 131:1
<b>proportionate</b> 261:22	<b>purchased</b> 64:19	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>raw</b> 116:8
<b>proposal</b> 63:1 135:21 136:10 183:9 216:15 217:22 274:8	<b>Purely</b> 4:19	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>Ray</b> 266:19
<b>proposal's</b> 218:17 219:15	<b>purpose</b> 17:19 26:20 27:7 39:2 40:3 209:5 228:12 270:12	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>reach</b> 228:20
<b>propose</b> 12:6	<b>purposes</b> 20:14 140:15 156:22 232:12 237:8 241:18	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>reached</b> 18:7
<b>proposed</b> 17:12 18:3 26:11 39:6 54:22 55:9 56:14 57:6 63:2 65:14 65:17 76:22 77:8 80:15 98:18 147:6 151:17 152:5,22 153:4 165:21 182:20 201:8 209:6,11 247:10 251:6 266:1 269:16 273:3	<b>pursuant</b> 1:17 4:8 232:6 233:6	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>reaches</b> 37:8
<b>prorate</b> 197:3	<b>put</b> 11:22 31:20 35:7,20,20,22 36:3 44:1,13 48:14 53:8,9,17 55:19 58:18 59:3 59:13 73:10 77:21 85:7 90:9 100:8 101:20,22 103:16 104:16 106:5	116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>read</b> 4:21 16:13 36:12 144:13 165:13 227:12
<b>proration</b> 198:18		116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>reading</b> 159:17
<b>prospects</b> 241:8		116:9 138:17 142:6 191:13	<b>questioning</b> 47:10	<b>ready</b> 24:19 82:8 87:19 105:11 207:4 217:20 225:17 276:17

70:16 100:9	<b>record</b> 4:4,15,22	145:19 188:7	92:1,7 93:14	<b>reported</b> 74:2
102:16 104:16	11:22 17:21 20:14	254:16 271:1	94:20 95:6 199:22	270:8 271:11
105:5 106:18	25:4,5 26:22	<b>reflect</b> 190:13	255:3	<b>Reporter</b> 148:15
107:7 117:22	68:18 82:10,12	198:21 236:1	<b>regulations</b> 62:6	276:7
118:2,12 119:15	88:4,6 96:13,14	<b>reflection</b> 92:7	170:16	<b>reports</b> 74:2 140:7
119:17,20,22	96:16 102:9	<b>reflects</b> 93:19	<b>related</b> 17:5	<b>represent</b> 5:17
120:3,5 121:11,13	143:20 144:13	<b>regarding</b> 10:9	<b>relation</b> 269:5	26:13 77:11,16
121:20 122:10	146:19 165:13	12:4,8,19 14:3	<b>relationship</b> 19:19	231:9 252:13
123:4 124:12	195:3,4,6 207:6,8	233:3	44:22 232:21	<b>representative</b>
125:22 127:7	223:9,10,12	<b>regardless</b> 58:21	243:3 266:20	26:14 98:4
130:13,14 134:12	224:22 225:11	185:1 240:14	269:10 270:19	<b>represented</b> 231:19
137:5 146:6 176:2	226:18 227:13	<b>regards</b> 197:15	273:8	252:15
177:16 180:5	271:22 276:8,10	<b>region</b> 72:3,6,8	<b>relative</b> 135:16	<b>representing</b> 8:10
186:11,20 187:18	<b>recorder</b> 249:7	111:6 112:2	<b>relatively</b> 44:11	181:16
193:3 199:9	<b>recounted</b> 46:3	144:19	77:14 84:16	<b>represents</b> 251:11
203:16 219:11	<b>recovered</b> 103:7	<b>Regional</b> 6:22	125:11 127:4	<b>request</b> 104:17
221:3 255:18	<b>recurring</b> 171:13	<b>regions</b> 72:7	<b>release</b> 3:14,15	106:7 203:13
259:2 260:16	<b>Red</b> 3:18 15:15	111:22	12:19 14:3 43:13	224:20 228:7
<b>reason</b> 80:11 89:20	<b>redeem</b> 51:8	<b>register</b> 4:9 12:7	61:15 62:1 169:22	<b>requested</b> 274:9
92:19 106:2	<b>redefine</b> 230:15	191:13	<b>released</b> 28:17	<b>require</b> 32:4 35:6
112:17,21 124:4	<b>redefining</b> 247:13	<b>regression</b> 242:22	43:15,16 44:9	35:20,21 36:8
199:14	<b>redirect</b> 24:3	<b>regulate</b> 31:5 62:21	<b>relevant</b> 4:18 17:21	37:3 47:1 65:3
<b>reasonable</b> 36:22	<b>reduce</b> 59:18 78:10	118:1	30:12 32:10	<b>required</b> 31:12
<b>reasons</b> 30:10	107:12 126:10	<b>regulated</b> 28:1 45:5	142:18	32:18 37:11,20
40:16 46:19 52:2	154:19 168:2	45:18 46:3 48:20	<b>relying</b> 246:12	42:6 48:21 143:20
73:5 110:11	247:10 261:7	49:1 59:8,8 60:12	<b>remain</b> 150:11	<b>requirement</b> 36:1
127:10 152:17	<b>reduced</b> 169:15	64:10,19 80:20	246:15	36:19 37:12 39:12
159:21 193:1	234:3 238:22	84:7 89:7,10	<b>remains</b> 257:14	45:1,15 160:8
<b>recall</b> 87:4 143:5	257:17 259:18,22	161:22 229:1,4	<b>remember</b> 52:11	<b>requirements</b> 29:8
148:5	263:5,12 266:17	243:20 256:2	83:8 110:18	32:1,19 34:5 38:7
<b>recalling</b> 83:10	<b>reduces</b> 154:22	<b>regulating</b> 45:18	112:14	65:4,6 237:17
<b>receipts</b> 76:8,10	246:1	<b>regulation</b> 29:8,12	<b>remembering</b> 34:8	<b>requires</b> 92:12
146:22 181:20,22	<b>reducing</b> 126:18	29:17 30:6,11,13	<b>remiss</b> 57:8,14	259:6
212:9,12	<b>reduction</b> 261:13	31:8,11,16,22	<b>remove</b> 39:10 46:7	<b>research</b> 98:11
<b>receive</b> 106:15	<b>refer</b> 140:2 156:20	32:16,19,20 33:4	210:11	114:6 115:11,21
149:20 240:7	266:18	33:18,22 34:6	<b>removed</b> 55:1	117:3
246:19 269:21	<b>reference</b> 138:8	35:1 36:15,19	<b>render</b> 258:5	<b>reserve</b> 28:15,17
<b>received</b> 17:7 31:14	143:11 224:22	37:12,18 39:12,16	<b>rent</b> 200:3	32:10,12,13 35:5
254:20	234:8 248:19	41:19 42:3 45:10	<b>repeat</b> 20:2 149:1	36:4 38:20 40:22
<b>receives</b> 71:17	269:5	45:14,20 46:1,9	<b>replanting</b> 109:20	41:1 43:11,12,14
157:8 234:2	<b>referenced</b> 22:8	46:16 51:6 52:10	<b>replenished</b> 28:18	43:18,19,22 44:2
<b>receiving</b> 140:19	<b>referred</b> 4:9 28:11	52:10 53:13 54:5	<b>report</b> 17:15,19	44:6,7 53:18,20
162:13 246:11	43:10 92:14	55:9 57:10 62:9	18:4 74:4 110:22	61:3,3,8,11,20,21
<b>recert</b> 60:21	123:19 156:2	64:20 67:21 79:8	111:4 115:3	62:20 73:14,22
<b>recognize</b> 233:9	230:2 261:16	79:10,11 81:2	116:10 140:3	127:15,16,17,21
<b>recognized</b> 51:4	262:2	84:10 88:8,9,11	143:2,3 144:17,17	128:16 219:17
<b>recommend</b> 175:15	<b>referring</b> 54:4	88:20 91:2,13,15	187:20 188:6	247:8 261:19,22

262:9	234:12,14,16,19	273:20	220:1 222:21	<b>runs</b> 159:12
<b>reserves</b> 43:1,9	234:21 235:1,11	<b>revenue</b> 167:17	231:1 234:14	<b>R-i-c-h-a-r-d</b> 150:5
61:15 127:15	235:17 236:5,13	245:17 247:9	235:5 238:9	<b>R-o-t</b> 115:16
240:8 241:6 244:7	236:15 237:1,9,13	<b>reversed</b> 271:1	272:11 274:16,22	<b>R-o-t-h-w</b> 145:4
244:8,10 246:16	238:9,10,13,20	<b>review</b> 110:21	276:15	<b>R-o-y</b> 145:2 164:21
260:20 261:9,14	239:1,4,21,22	<b>Reviewing</b> 270:8	<b>ripens</b> 267:11	<b>r-squared</b> 243:3
261:17,17 262:2	242:2 243:22	<b>revised</b> 57:12 258:8	<b>rises</b> 37:6	
262:12 263:5	246:14 247:19,22	<b>re-read</b> 166:20	<b>risk</b> 246:4,5,11	<b>S</b>
<b>resolve</b> 4:16	248:17 254:11	<b>re-voted</b> 178:19	<b>Riverdale</b> 7:15	<b>S</b> 1:21
<b>resort</b> 174:15,15,18	256:4 257:7,11,20	<b>Rich</b> 151:7 153:20	<b>road</b> 49:20 165:15	<b>safety</b> 177:1
177:18 189:16,17	258:3,7,10,18,20	155:18 158:3	178:15	<b>salable</b> 44:5
201:19 202:4	258:22 259:2	263:21	<b>roll</b> 172:15 173:3,5	<b>sale</b> 74:1 122:7
244:20	260:8,17,22 266:5	<b>Richard</b> 3:8 147:21	<b>rolling</b> 11:21	210:22 228:16
<b>Resource</b> 17:10	266:11	150:4,14	272:22	<b>Salehi</b> 2:7 6:9,10
<b>respect</b> 22:17	<b>restrictions</b> 82:18	<b>rid</b> 121:11	<b>room</b> 9:7 85:10	13:10 63:13,14,16
<b>respective</b> 241:20	166:16 167:2	<b>ride</b> 203:9	106:1 170:18	63:19 71:10,12
<b>respectively</b> 190:9	235:7 238:5	<b>rider</b> 150:7	<b>rose</b> 173:13	74:11,12,17
190:11	240:18 241:8	<b>rides</b> 194:11	<b>rotate</b> 43:19,22	123:14,16 144:7
<b>respond</b> 119:2	244:5,18 273:19	<b>right</b> 6:13 8:1,15	<b>Rothwell</b> 115:8,16	144:10,12,15
<b>response</b> 58:11	<b>restrictive</b> 244:6	9:4,17 10:1,2	144:21 145:4	148:22 155:19,21
120:13	<b>result</b> 30:20 33:19	15:12,18 16:1,5	<b>roughly</b> 100:4	159:14,16 200:20
<b>rest</b> 153:12	36:8 53:16 82:1	18:11,13 19:22	104:6,7 106:13,14	200:21 201:1
<b>Restate</b> 80:18	101:19 104:8	20:2,10 21:17	109:22 124:22	225:6,20
<b>restated</b> 41:16	248:9 254:14	24:2,6,10,16,20	130:11 131:14	<b>sales</b> 7:6 28:1,6,7
<b>restrain</b> 273:5	258:1 261:12	25:7 47:9 51:18	191:4	34:17 37:7 38:7
<b>restrict</b> 65:7	263:10	58:9 69:3 76:18	<b>round</b> 52:22	38:16 58:19 59:16
<b>restricted</b> 28:10	<b>resulted</b> 37:18 78:9	80:17 81:6,10,12	<b>rounding</b> 95:7,8	60:3 79:18,21,21
29:1 56:20,22	<b>results</b> 271:13	82:4 83:9,14,18	<b>row</b> 49:10,12	79:22 80:8 84:11
57:1 61:14,17	<b>resume</b> 276:19	87:8,14,14,17	<b>Rowley</b> 266:19	84:14 88:13 89:18
64:4,15,18 65:3,5	<b>retired</b> 115:12	88:5 89:3,15,20	<b>rows</b> 49:8	212:13 220:3
151:22 152:3,12	<b>retract</b> 192:6	90:1,14 92:22	<b>Roy</b> 3:9 144:20	241:9 247:9
158:13 161:19	<b>return</b> 69:15 70:13	93:8,21 94:1,13	145:2 164:9,21	<b>sample</b> 160:16
218:17,19,21	72:21 81:16	94:16 96:15,20,21	165:4,14 168:19	<b>sampling</b> 50:3
232:11,15 233:3,7	158:10 175:8	121:15 137:7	176:13 183:8	<b>satisfy</b> 29:8,12
233:10 235:4	185:10,13 189:19	138:6 141:14	184:17 190:6	31:22 32:19 34:4
241:15,17,22	219:1 240:4	144:5 147:2,16,20	<b>Roy's</b> 204:2,9	34:14 35:14,18
245:3 252:19	264:16 271:10	148:1 149:19,22	206:4	36:1 37:11 44:16
253:12 254:8,19	273:2,5	150:10,12 164:18	<b>rule</b> 4:6 30:2 70:20	51:11 55:8 60:20
256:6,14,22 257:1	<b>returns</b> 27:16,20	165:2 182:17	178:3 186:20	61:1 62:9 65:1
257:6 258:15,16	30:8 39:4 40:5	184:20 186:7	190:21 191:11,12	91:1,15,22 93:14
259:17,18 267:14	41:7,14 73:4	189:3 194:19	197:16,18 198:3	<b>save</b> 158:7
<b>restricting</b> 28:1	101:19 107:8,10	195:5 199:12,19	201:14 220:9	<b>saved</b> 41:5 71:8
<b>restriction</b> 44:17	153:9 154:17	203:3,4 204:5,22	233:11 244:20	263:19
51:11 83:5 155:12	187:16 228:14	205:4 206:6,9	<b>rules</b> 166:12	<b>saving</b> 158:9
166:13 169:17	238:19 247:10	207:3,16,20	197:15 201:4	<b>savings</b> 108:2,13
184:1 230:10,21	269:7,9,21 270:2	212:15,16 213:8,9	<b>run</b> 160:20 211:2	113:19,22 114:15
233:5,15,17,21	270:3,12,13	213:10 215:15	<b>running</b> 193:20	114:19 122:14,14

126:14 263:9,17 264:4 <b>saw</b> 100:19 175:18 177:9,9 187:16 265:11 272:12 <b>saying</b> 58:2 123:7 179:18 192:1 202:14 236:20 256:1 <b>says</b> 23:9 48:16 51:1 58:16,18 65:4 70:20 159:19 196:10 232:4 235:14 250:19 251:18 <b>scary</b> 46:10 <b>schedule</b> 193:20 195:2 <b>scheduled</b> 4:7 9:21 276:19 <b>schedules</b> 198:21 <b>score</b> 199:2 <b>scribbled</b> 144:3 <b>sealed</b> 38:21 <b>season</b> 29:5 48:16 71:16,20 135:2 153:13 203:15 227:3 228:10 233:12 236:2,7,21 239:10 <b>seated</b> 5:11 6:14 8:3 11:4,7 150:11 164:19 195:12 207:12 <b>second</b> 33:10 34:1 34:9 65:11 105:21 107:21 126:6,12 126:16 137:12 147:19 252:9 257:10 <b>secondary</b> 32:13 40:22 43:12 44:6 44:7 53:20 73:13 127:16 170:1 179:22 180:4 244:8 245:8 261:18 262:2,7,9	262:11 <b>Secondly</b> 73:9 107:17 <b>Secretary</b> 1:1 5:3 151:16 224:17 <b>section</b> 34:13 35:2 91:1 94:18 229:20 230:3 231:2,12 232:6,18 <b>sections</b> 63:3 233:18 <b>see</b> 20:12 24:2 32:15 35:10 38:9 72:6 82:12 91:14 93:14 104:13 106:4 108:5,21 119:5,11 125:3 133:7 136:9 145:14 147:6 154:9 159:2 160:17 165:12 173:13 177:5 178:2 182:20 183:8 185:14 192:15,17 194:2,9 201:6,16 213:6 217:21 220:5 221:7 242:2 249:12,17 250:18 260:4,6 261:11 267:18 271:19 275:22 276:16 <b>seed</b> 19:11 <b>seeking</b> 228:15 <b>seeks</b> 229:13 <b>seen</b> 27:12 31:6 66:15 101:12 122:1 128:20 178:9 193:3 237:15 242:11 244:22 248:21,21 263:6 271:8,13 272:14 <b>seldom</b> 192:18 <b>sell</b> 34:8,10,18,20 35:1,19 36:10,16 37:19 55:12 61:9	62:13 95:4 119:20 124:7,9 155:11 176:4 185:21 <b>selling</b> 103:11 125:17 153:3 155:1 182:11 245:16 <b>send</b> 221:15 <b>sense</b> 62:16 184:11 185:9 198:2,3 240:12,13 <b>sent</b> 115:13 117:9 224:17,18 225:13 225:14 227:2 <b>separate</b> 63:5 104:16 214:3 254:6 <b>September</b> 3:21 52:19 110:20 144:17 181:9 213:4 224:10 235:22 237:10 251:5 <b>sequence</b> 20:16 <b>serious</b> 192:21 <b>serve</b> 26:18 98:4 169:6 200:15 230:13 246:8 <b>served</b> 26:15,17 151:14 166:3 178:16 <b>serves</b> 247:9 <b>Service</b> 5:17 6:6,20 7:5,20 17:18 <b>serving</b> 151:16 <b>set</b> 61:13 106:16 140:14 169:2 170:8 185:21 237:12 238:7 239:16 251:4 <b>seven</b> 18:5 56:8 76:8 95:7 101:14 108:4 182:7,13 191:5 228:4 242:9 263:16 <b>severely</b> 239:18 <b>shake</b> 130:3 162:11	215:9,11 <b>shakes</b> 160:6 <b>shaking</b> 130:19 205:10 <b>shallow</b> 132:3 <b>share</b> 35:5 37:16 75:2 135:13 <b>shared</b> 73:19 202:6 <b>shares</b> 232:15 <b>sharing</b> 135:10 <b>Sharlene</b> 2:5 5:14 140:7 <b>sheet</b> 9:6 94:17 222:13 <b>shelf</b> 32:9,14 43:6,8 44:12 <b>shipping</b> 122:15 130:20 <b>short</b> 24:18 34:21 35:18 44:12 53:21 71:20 72:5 102:9 102:21,21 103:2 109:11 110:4 119:19 121:12 176:15,15 177:4 177:21 214:9 268:19 269:1 <b>shorted</b> 177:3 <b>shortening</b> 177:22 <b>shorter</b> 109:1,2 125:14 269:8 <b>shortfall</b> 35:15 37:7 55:8 95:6 <b>shots</b> 21:9 <b>show</b> 31:2 93:1 <b>showing</b> 29:14 190:7 272:9 <b>shown</b> 18:5 19:20 31:2 90:7 <b>shows</b> 18:6 19:3,6 19:10,14 74:4 190:9 273:1 <b>side</b> 84:21 94:16 137:7 155:10 157:16 175:18 178:8 217:21 233:8 234:15	236:9 254:3,5 263:11 <b>sign</b> 9:8,8 159:8 <b>signature</b> 13:10 222:15 <b>signed</b> 222:13 <b>significant</b> 29:19 42:4 101:18 103:21 108:6 241:4 245:10 263:9 265:10 <b>significantly</b> 44:15 78:16 101:11 102:5 127:7 128:9 128:10,20 266:17 <b>sign-in</b> 9:5 <b>similar</b> 74:8 100:19 101:5 127:13 238:7 <b>simple</b> 218:7 <b>sink</b> 131:15 <b>sit</b> 153:7 220:19 <b>site</b> 199:13 <b>sits</b> 251:17 <b>sitting</b> 53:19 <b>situated</b> 209:1 <b>situation</b> 32:10 77:19 126:22 133:9 183:11 214:9,17 244:3 <b>situations</b> 122:21 265:19 268:4 <b>six</b> 56:8 102:6 108:4,11 109:22 160:9 <b>sixth</b> 105:9,16,17 <b>sixties</b> 52:13 <b>size</b> 28:5 32:16 40:8 40:12 52:17 69:11 69:13 70:16 75:6 75:13,14 79:15,17 104:10,13 108:10 128:5 152:19 160:2 185:5 241:3 241:6 242:14 243:14 265:7 266:17,21,22
---	---	---	--	---

267:15 268:9 270:20 273:7 <b>sized</b> 111:17 268:3 <b>sizes</b> 33:8 215:13 <b>sleep</b> 274:12 <b>slide</b> 92:5 <b>slight</b> 42:3 161:18 <b>slightly</b> 39:16 66:13 100:20 <b>slipped</b> 173:20 <b>small</b> 33:15 35:12 40:8 67:2 75:16 75:21 76:6,7,9,17 76:18,19,20 77:1 77:4,5,6,10 90:8 98:3 99:9 111:20 113:16 125:10,11 127:2,5 130:2,13 131:1,4 146:18,20 146:21 147:4,5,7 151:12 159:2,3,4 160:7 166:13 181:19,20,21 182:8,19,19,21 183:2 198:11 199:18 202:16 212:5 268:13 <b>smaller</b> 33:12 53:4 100:20 102:12 127:4 210:17 242:15 247:17 249:19 254:17 267:1 <b>smashed</b> 132:2 <b>snow</b> 186:13 <b>soft</b> 131:22 135:2,5 <b>sold</b> 58:22 59:1 142:19 153:6 <b>solely</b> 68:8 238:22 <b>somebody</b> 87:1 134:18 175:6 210:7 <b>somebody's</b> 173:16 <b>somewhat</b> 33:3 137:10 184:7 192:16 248:12 <b>sons</b> 165:16	<b>soon</b> 205:2 <b>sorry</b> 64:11 74:12 74:15 80:18,19 83:17 86:17,18 88:7 148:22 226:10 253:19 <b>sort</b> 65:12 121:20 184:6 189:5 257:22 <b>sorted</b> 241:15,22 <b>sound</b> 201:5 <b>sounded</b> 179:17 <b>sounds</b> 118:4 <b>source</b> 17:17 22:8 138:10 140:17 234:16 238:10 <b>sourced</b> 138:22 <b>sources</b> 138:12 <b>south</b> 214:4 217:7 <b>Southeast</b> 7:6 <b>southwest</b> 111:13 208:14,18 212:19 212:22 215:16 228:3 <b>speak</b> 97:16 142:14 148:4 189:21 270:14 <b>speaking</b> 146:6 157:16 196:13 201:2 <b>specific</b> 61:12 121:2 146:7 <b>specifically</b> 22:20 43:4 <b>specifies</b> 49:13 <b>specify</b> 111:3 <b>speculate</b> 70:8 153:2 201:6 <b>speculated</b> 113:11 <b>spell</b> 5:20 8:22 25:13 96:17 115:15 145:1 150:1 164:19 195:8 207:13 223:13 <b>spelled</b> 5:22 6:1,4 6:10	<b>spend</b> 117:2,3 187:21 <b>spent</b> 98:6,14 168:8 187:2 <b>spoke</b> 226:6 <b>spreadsheet</b> 85:6 85:10 <b>spring</b> 186:19 197:12,12 <b>stabilization</b> 29:15 <b>stabilize</b> 28:16 <b>stabilized</b> 27:20,21 270:18 271:1 <b>stabilizing</b> 28:19 <b>stably</b> 249:15 <b>stacked</b> 131:22 <b>stand</b> 9:13 11:4 81:17 87:17 275:1 <b>standing</b> 249:2 <b>start</b> 89:13 168:13 178:22 214:1 216:1 217:13 224:15 225:16 274:20 275:13 <b>started</b> 33:6 52:13 89:21 213:22 215:19 <b>starting</b> 5:10 235:13 <b>starts</b> 49:4 159:20 <b>state</b> 10:12 11:8 17:9,11 25:13 26:13 96:17 97:19 98:7 115:6 117:8 117:10 149:22 164:19 195:8 207:13 223:13 228:1 <b>stated</b> 26:20 27:6 39:2 40:17 74:18 146:17 154:18,20 226:11 242:11 270:11 <b>statement</b> 26:5 67:12 97:15 151:4 154:3 159:18 163:21 165:12	264:13 <b>states</b> 1:1 4:13 5:1 5:15 8:7 14:12 18:6 114:13 225:22 227:15,17 228:4 <b>statewide</b> 112:6,9 139:16 <b>state's</b> 189:12 <b>station</b> 98:12,13 115:12,21 <b>stationed</b> 6:7 <b>Statistic</b> 17:18 <b>statistical</b> 3:17 15:15 17:2 103:6 <b>statistically</b> 50:2 <b>statistics</b> 17:16 116:10 <b>stats</b> 142:6 243:7 <b>stay</b> 222:22 276:9 <b>stays</b> 106:20 256:2 <b>steadily</b> 272:16 <b>steady</b> 273:1 <b>step</b> 24:11 87:4,9 95:16 133:18 147:17 163:17 193:18 203:5 206:10 222:10 <b>steps</b> 205:20 251:8 <b>stipulates</b> 89:16 <b>stopped</b> 270:22 <b>storage</b> 41:2 73:18 153:8,8 154:19 155:1 156:2,8,10 176:5 191:2 210:12 214:21,22 215:1 263:21 264:5 <b>stored</b> 247:3 <b>storing</b> 246:12 <b>storm</b> 99:7 215:21 <b>straight</b> 130:7 <b>stretch</b> 214:5 274:13,19 <b>strictly</b> 155:15 <b>strong</b> 185:14 221:12 240:2	<b>stronger</b> 266:14 273:9 <b>structure</b> 32:22 55:7,9 57:12 79:5 79:6,10,12,15 80:15,20 94:7 <b>structured</b> 230:13 <b>student</b> 116:11 142:1 <b>Studies</b> 110:15 <b>study</b> 111:12 131:3 <b>stuff</b> 62:19 <b>subject</b> 233:8,20 234:18,21 247:19 <b>submits</b> 237:2 <b>subsequent</b> 122:20 <b>substance</b> 10:18 <b>substantially</b> 70:1 <b>substantive</b> 10:4 <b>subtract</b> 100:6 <b>succeeding</b> 176:15 <b>success</b> 117:22 120:4 271:7 <b>successful</b> 38:21 178:17 <b>sudden</b> 210:10 <b>suffers</b> 265:19 <b>sufficient</b> 191:16 <b>sugar</b> 159:11,12 187:11 <b>suggest</b> 39:4 40:5 206:12 <b>suggested</b> 52:12 176:13 <b>suggests</b> 240:15 243:12 <b>summarize</b> 108:18 133:1,4 <b>Summer</b> 200:16 <b>supplied</b> 118:8 <b>supplies</b> 121:12 142:16 176:15 232:20 269:5 <b>supply</b> 27:16,18,19 28:13,16,19 40:12 59:22 60:1,2 84:13,21 89:4,6
--	---	--	--	---

89:16 100:4 101:7 101:17 104:4,6 105:20 117:17 151:21 168:7 211:20 228:21 230:1,17 232:11 232:12,14,18,22 239:13,20 251:3 252:9,16 253:11 253:13 254:1,5,8 254:19 255:2,7 257:8 258:4,8 259:4,7,15,20 260:1 261:4 264:20 265:13 267:16 269:20	<b>surveys</b> 140:13,17 <b>sustainability</b> 109:9 <b>sustainable</b> 110:7,9 120:19 <b>Suttons</b> 98:1 134:16 <b>Suzanne</b> 144:21 145:5 <b>swear</b> 11:6 96:21 150:11 164:18 195:12 <b>sweet</b> 196:5 <b>sworn</b> 11:16 25:20 97:4 141:18 150:16 165:6 195:16 208:2 223:12 <b>system</b> 39:5 175:11 <b>S-a-l-e-h-i</b> 6:11 <b>S-h-a-r-l-e-n-e</b> 5:22 <b>S-u-z-a-n-n-e</b> 145:5	197:20 206:11 234:19 238:17,18 256:5 259:14 261:5 274:13 <b>taken</b> 17:13 23:15 145:11 <b>takes</b> 35:13 91:16 103:14 124:17 170:2 <b>talk</b> 10:17,21 26:7 53:22 81:18 87:6 87:10 101:12 102:18 133:7 176:20 238:9 258:7 <b>talked</b> 42:22 48:1 113:18 136:13 172:6 178:5 190:11 242:1 258:14 261:15 264:5 275:20 <b>talking</b> 98:22 134:14 161:16 179:16 203:16 263:4 <b>talks</b> 44:14 258:13 272:12 <b>tank</b> 50:15 130:4,4 <b>tanks</b> 50:16,17 131:14,17 132:14 <b>tape</b> 249:7 <b>tariff</b> 181:3 <b>tart</b> 1:5 3:18 5:4 10:9 15:15 17:14 17:15 19:3,7,11 19:15 26:11,12,21 27:8,18,22 71:21 76:12 78:3,5 80:17,21 107:1 111:6 144:19 161:12 182:1 184:7 188:13 196:5 227:15,17 228:16 229:3,21 230:14 232:20,22 267:2 272:15 273:8,22 274:2	<b>technical</b> 248:12,13 <b>teeter</b> 182:11 <b>tell</b> 8:3 116:20 157:17 195:22 198:7 208:12 209:6 210:16 224:13 <b>temperatures</b> 132:18 <b>ten</b> 25:6 32:4 33:21 34:4,9,14,17 38:15 75:17,19 79:22 80:6,8 81:15 82:4,6,7 84:11 87:18 88:13 89:13,17 90:7,7 90:10 96:11 122:6 125:1 148:13 190:9 <b>tenable</b> 248:9 <b>tend</b> 212:20 236:10 242:2 269:4,9 <b>tendency</b> 270:14 273:6 <b>tends</b> 236:9 268:13 <b>tenth</b> 105:18 <b>term</b> 109:8,11 110:4,5 123:21 125:6 126:2,3 176:12 213:14 219:14 230:15 234:5,6 247:13 <b>terminology</b> 124:3 <b>terms</b> 121:14 123:6 199:12 261:18 270:14 <b>testified</b> 11:16 15:9 25:20 97:4 138:2 141:18 145:17 150:16 157:12 165:6 195:16 208:2 <b>testify</b> 10:21 26:10 151:17 153:21 193:3,22 194:10 194:17 <b>testifying</b> 162:19	193:4 194:9 <b>testimony</b> 3:17,18 3:20,21 4:14 15:3 15:20 16:11,14 23:7 30:18 36:5 42:8 45:19 47:15 47:18 68:20 79:4 81:22 141:21 156:1,20 158:14 159:17 168:19 175:22 187:7 203:8 224:12,15 225:16,19 227:12 228:6 237:8 243:5 248:18 251:22 259:6 263:1 <b>Testimoy</b> 3:22 <b>thank</b> 6:2,13 10:6 11:12,18 20:6 23:2,16 24:10,16 25:3,22 42:9 47:4 47:14 58:9 63:9 63:11 67:7 72:10 74:10 77:7 78:2 94:13 95:12,16 97:6 113:10 116:1 120:22 123:13 126:6 129:1 146:10 147:9,16 150:18 151:7 153:10,14 155:18 156:12 157:4 161:5 163:10,16 165:1 168:16 179:12,13 182:17 183:4 186:4 191:9 193:17 195:11,18 199:17 202:10 203:4 206:9 207:19 208:4 216:5 221:22 222:10,11 275:8 <b>thanks</b> 81:12 94:2 135:22 136:4 137:14 148:15 158:19 184:13 200:18 217:15
<b>supply/demand</b> 273:8 <b>support</b> 27:6 66:1 69:17 98:18,21 120:6 165:19 245:19 <b>supported</b> 274:1 <b>supporting</b> 27:15 116:16 <b>supposed</b> 226:22 <b>supposition</b> 260:10 <b>surcharges</b> 113:20 263:14 <b>sure</b> 18:12 20:4 43:3 79:3,7,14 85:19 97:21 112:15 115:7 142:3,14 144:15 148:8 160:4 165:14 188:15 203:20 204:19 205:2 215:20 219:3 223:6 224:21 259:15 <b>surplus</b> 45:11,11 78:5 79:16 230:7 255:6,12 256:17 256:18,19 257:13 <b>surpluses</b> 167:6 <b>surprise</b> 105:22 <b>survey</b> 139:11	<b>T</b> <b>T</b> 2:17 <b>table</b> 5:12 6:15,16 8:2 42:11 119:10 141:1 153:16 168:14 234:10 235:5 237:12 238:6,7 241:13,21 242:9 244:21 245:9,9 271:13 272:11 <b>tables</b> 17:16 18:4 265:11 <b>take</b> 4:14 5:9 9:16 20:11 45:22 53:10 65:12 80:16 81:14 85:16,18 87:13,17 93:17 121:3 130:6 135:4,11 143:7,15 143:18 144:14 145:8 154:5 169:20 170:6 176:19 177:2 185:18 194:1,7			

218:9	184:2 186:10	94:22 95:5 104:3	243:20 251:22	<b>trade</b> 136:11 137:4
<b>theoretically</b> 44:1	187:2,22,22 188:8	105:4,6 107:10	<b>Tom</b> 24:22 42:15	137:5
60:22	188:15 189:8,9,12	126:9 130:18	42:21 44:14 68:19	<b>traditional</b> 120:3
<b>theory</b> 27:15	189:14,21 190:13	146:7 156:8 224:8	70:9 82:16 84:20	<b>traditionally</b>
<b>they'd</b> 177:18	190:15 191:20,20	227:22 241:13	86:5 87:6 88:22	186:18 247:16
<b>thing</b> 4:19 49:21	192:14,15,21	251:2 253:22	93:13 104:2	<b>train</b> 83:6
58:10 59:12 61:12	193:2 194:12,13	254:9 255:9,10,11	107:17 119:7	<b>transfer</b> 110:8
132:21 184:6	201:13 202:5	256:2 261:3 272:2	121:15 123:4	<b>transition</b> 118:15
187:19 209:13	203:15 204:16,20	272:21	133:9 163:5 174:9	<b>transitioning</b>
211:14,17 220:14	205:15,21 206:3	<b>three-quarters</b>	231:10 250:19	118:10 120:2
260:5 275:1	206:16 209:12,12	263:22	254:16 256:1	<b>transportation</b>
<b>things</b> 11:21 21:10	209:17,20 214:20	<b>three-tenths</b> 191:3	259:5	129:13 263:12
69:20 72:12 74:8	216:15,18 217:4	<b>threshold</b> 152:20	<b>tomorrow</b> 9:20,22	<b>transporting</b>
116:17 121:22	218:1,6 219:4,11	155:16 160:3	<b>Tom's</b> 187:20	108:16
179:7 191:3	219:12,21 220:5	233:17	188:9,13 251:22	<b>Traverse</b> 98:2
205:16 249:3	221:14 222:3,5,6	<b>tied</b> 184:5,7	256:8	213:6
<b>think</b> 9:15 10:2	226:22 252:1,3	<b>tight</b> 107:8	<b>tonnage</b> 28:3 39:17	<b>Treasurer</b> 26:18
52:11,21 53:4	258:4 263:21	<b>time</b> 20:8 24:17	58:13 59:9,19	<b>treated</b> 92:10,11
55:22 57:12,13	264:12 274:11,20	30:2 41:8,13 44:3	61:4 88:10,12	232:2
59:12 61:14 64:8	276:3	47:7 68:10 69:20	167:9 169:10	<b>treatment</b> 172:7
66:15 80:2 81:21	<b>thinking</b> 137:6	70:22 86:20 93:5	171:19 173:10	254:14
83:11 85:6 86:2,6	203:21,22 218:15	101:6,9 102:12	176:21 180:1	<b>tree</b> 70:2 152:17
86:8 87:7 93:2	<b>thinks</b> 189:19	104:22 105:16	254:12 256:14	159:22 160:6,6,11
108:18,18 110:11	<b>third</b> 23:8 33:11	111:11 134:9	<b>tool</b> 77:15 123:2	160:11 162:12
110:16 112:16	34:2,11 107:7,22	138:8,10 149:4	179:8 181:5 187:6	215:10
113:14 115:18	126:14,16 139:20	155:2 168:9,10	187:15 234:4,7	<b>trees</b> 49:8,13,17
117:21 119:1,5,7	199:5 237:20	178:6,19,21 187:1	240:6 246:7 261:6	50:3,4 130:3
119:11,14,14,17	251:5	187:21 203:8	<b>tools</b> 62:9 189:18	154:4 160:4 267:9
119:21 120:5,16	<b>thirteen</b> 100:12	205:16 214:5	190:21 244:3	<b>trend</b> 242:11
120:18 121:10,13	<b>Thomas</b> 3:4 25:15	236:17,18,22	246:13	243:12 270:21
122:10,16,17	25:18 26:9	242:17 275:16,20	<b>top</b> 32:22 33:3 55:5	273:6
123:3,3 124:3,5	<b>Thornsbury</b>	<b>timely</b> 247:2	84:6 91:3,14,17	<b>trouble</b> 218:6
125:12 126:15	144:21 145:5	265:17 267:11	94:22 110:18	<b>truck</b> 176:6
129:12 133:3	<b>thought</b> 46:9 83:7	<b>times</b> 175:19,20	125:22 188:2,21	<b>trucking</b> 154:21
136:12 137:5,8	83:11 86:17 99:11	213:20 215:18	<b>topic</b> 78:3 270:5	<b>trunk</b> 160:7
141:8 144:3 146:5	113:11 117:18	243:19	<b>total</b> 18:7 34:17	<b>truth</b> 223:21
147:12 149:3	166:9 186:7 217:3	<b>Timing</b> 7:22 16:21	60:7 109:12	<b>try</b> 98:20 120:16
154:8,12 155:10	<b>thoughts</b> 214:12	<b>title</b> 144:15,18	114:17 197:3	148:17 155:11
160:9 161:13,14	253:16	173:1	235:4 241:17	170:20
161:17,20 162:12	<b>three</b> 28:6 48:12	<b>titled</b> 17:15 111:5	252:18 253:2,13	<b>trying</b> 59:14 93:1,1
163:13 166:6	58:19 59:2,16	248:15	255:22 262:9,10	112:13 123:5
168:10 169:10,11	60:3 63:1,2,5 73:5	<b>today</b> 9:14 10:8	262:13,16,19	<b>turn</b> 173:1 230:16
171:4,5,10 173:4	74:7 79:21,22	11:2 26:10 47:15	271:10	<b>tweaking</b> 95:13
173:12 174:4,8,8	80:8 84:11,13	69:8 70:6 112:6	<b>totals</b> 139:5,18	<b>twelve</b> 124:22
174:19 175:16,22	88:12 89:4,13,18	177:20 184:12	<b>totter</b> 182:11	<b>two</b> 9:16 21:9 52:7
176:18,22 177:17	91:16,18,18 92:4	193:3 194:3,4	<b>track</b> 187:2 192:11	63:21 69:20 91:7
178:2 183:2,13	92:5,6,6,12,12,14	208:10 223:7	<b>tracking</b> 153:10,11	95:5 96:8 97:13

100:12 101:9 123:17 131:2,3,3 139:4 140:1 141:1 146:1 149:4 151:10 186:17 190:7 228:22 234:22 238:6 243:3 257:12,15 263:1 265:11 267:13 272:2,20 <b>type</b> 4:19 <b>typed</b> 18:12 20:2 <b>typically</b> 39:20 50:16 71:19,19,21 72:8 73:17 99:8 118:8 <b>T-h-o-m-a-s</b> 25:16 <b>T-h-o-r-n-s-b-u-r...</b> 145:6 <b>t-stat</b> 243:4	<b>understanding</b> 16:10 63:4 163:3 174:1 225:3 <b>understood</b> 126:7 <b>undertake</b> 231:1 240:2 <b>undertaken</b> 236:17 <b>undertaking</b> 229:7 238:2 <b>undone</b> 49:17 <b>undoubtedly</b> 39:20 66:12 265:9 <b>unfarmed</b> 27:4 <b>unfortunate</b> 179:7 <b>Unfortunately</b> 30:5 147:3 247:7 <b>unintended</b> 197:15 201:3 <b>Union</b> 181:2 <b>unique</b> 215:16 217:6,10 <b>unit</b> 246:2 <b>United</b> 1:1 4:13 5:1 5:15 8:7 225:22 <b>University</b> 17:9,11 98:7 115:6 <b>unprecedentedly</b> 103:2 <b>unrestricted</b> 233:14 252:22 <b>unsuccessful</b> 39:1 <b>unusual</b> 72:5 274:5 <b>upcoming</b> 241:9 <b>USDA</b> 2:2 3:19,19 6:5 10:13 17:18 22:8 23:10 43:15 66:6 74:2 76:3 100:2,7,10,14 101:1 102:11 105:20 106:9 110:20 116:9,16 137:21 138:15,17 138:18 139:1,6,15 139:21 140:13,16 140:17,20 142:12 146:16 151:13 153:10 161:9	181:13 189:6 192:11 228:8 259:5 270:6,8 <b>use</b> 29:11 30:14 31:9 35:12 39:9 51:10 53:12 55:6 55:13 61:19 62:1 62:18,19,21 65:1 77:18 83:3 102:2 103:5 121:8 123:3 126:21 140:13 142:17,21 145:18 170:13,16 172:15 174:14 189:16,18 189:20,21 190:21 192:2 209:16,22 210:11 213:14 218:7 222:15 230:20 231:13 234:6 244:17 247:20 <b>uses</b> 238:14 <b>usually</b> 7:14 105:3 175:15 <b>Utah</b> 1:7 4:11 5:5 14:14 116:13 187:4 192:14 227:19 266:19 <b>utilization</b> 39:7 245:11 <b>utilize</b> 142:16 171:9 175:10 244:2 264:6 <b>utilized</b> 48:13,13 228:19 <b>utilizes</b> 31:21 234:1 <b>utilizing</b> 238:2 <b>U.S</b> 1:12 3:18 15:15 16:16 17:15,20 18:5,7 19:3,7,15 188:13	56:2 66:12 73:6 100:13 102:3 104:13,15 106:11 107:18,19 109:15 120:18 121:10,14 126:13 135:16 140:15 152:7 166:14,17 167:3,7 167:16 183:22 185:1,7 197:3 234:6,7,8 238:22 243:3 264:22 271:6,10 272:1,10 272:13,15,19,22 <b>values</b> 22:22 108:22 167:14 272:14 273:10 <b>Varela</b> 2:9 7:2,3,8 7:10 <b>variable</b> 27:9,10 75:15 92:15,17 108:3,14 113:19 114:19 122:14 129:16 130:11,19 263:19 <b>variables</b> 91:7 92:18 94:20 <b>variation</b> 177:14 <b>varies</b> 69:10 240:21 <b>various</b> 17:12 18:3 162:22 199:11 227:15 240:22 251:9,11 <b>vary</b> 111:22 112:2 121:15 122:9 137:10 <b>vast</b> 274:2 <b>Vegetable</b> 7:5,21 <b>vegetables</b> 17:4 <b>verified</b> 22:13 <b>versus</b> 79:6 162:2 <b>viable</b> 78:22 <b>view</b> 222:8 <b>viewed</b> 243:17 <b>violation</b> 163:9 <b>virtually</b> 101:17 106:20 274:4	<b>visually</b> 271:15 <b>vital</b> 120:6 <b>voir</b> 21:9 <b>volume</b> 28:10 29:1 45:6 54:5 56:15 57:1 58:13 60:12 62:10 80:12 81:9 81:9 153:21 156:14 237:15 242:3,13 254:20 255:8 257:13 265:6,12 <b>voluntarily</b> 49:3 <b>vote</b> 66:15 205:19 <b>voted</b> 66:17 114:11 117:7,19 <b>V-a-r-e-l</b> 7:3
<hr/> <b>U</b> <hr/>				<hr/> <b>W</b> <hr/>
<b>Uh-hum</b> 76:16 <b>ultimate</b> 228:12 <b>ultimately</b> 41:6 114:5 117:6,22 118:16 122:18 205:18 <b>umbrella</b> 272:17 <b>unable</b> 189:13 247:1 <b>unacceptable</b> 47:2 <b>unanimous</b> 274:4,7 <b>uncertainty</b> 239:6 239:7 <b>underestimate</b> 236:10 <b>underground</b> 183:20 <b>understand</b> 31:18 79:3,7 93:6 123:20 126:16 204:8,11,13 209:16 219:2 220:14 <b>understandable</b> 245:16				<b>wait</b> 15:9 <b>waited</b> 206:21 <b>wake</b> 274:10 <b>walk</b> 155:14 188:19 <b>want</b> 9:9 15:8 16:1 18:12 21:8 32:12 49:1,10 68:19 82:4,5 87:1,15,16 87:22 94:15,16 97:19 100:22 102:19 110:21 116:15 121:1 122:21 123:1,1 124:12 143:9 145:14 151:18 161:16 163:18 166:20 170:20 181:14,14 189:12 203:11 211:1,18 213:21 214:13 215:3,9,19,22 216:3 217:20 222:22 226:21 268:15 275:18 <b>wanted</b> 24:7 65:12 68:17 71:14 79:6 94:14 137:18 141:20 146:19
		<hr/> <b>V</b> <hr/>		
		<b>valuable</b> 271:3 <b>value</b> 19:15 27:1 41:3 42:6 50:6 51:3 54:9,9 55:16		

156:3 181:18 201:4 202:22 203:6 205:1 224:21 225:4 <b>wants</b> 51:6 133:22 194:12 213:19 <b>warranted</b> 265:21 <b>washing</b> 189:8 <b>Washington</b> 1:7 5:5 8:9 14:14 66:6 189:7 227:19 <b>wasn't</b> 52:4 93:5 101:20 124:3 136:7 173:9 176:9 227:3 <b>water</b> 50:16 131:10 131:14,16,16 132:5,6,15,16,18 <b>watershed</b> 118:5 <b>way</b> 31:17 32:21,22 42:19 43:8 45:2 50:11 52:14 56:3 57:15 61:18 62:11 77:21 82:17 87:15 91:6 107:21 112:22,22 114:1 116:17 124:2,5 125:4 130:9 136:18 146:9 151:20 158:15 162:10 170:5 171:8 172:5,16 174:22 175:1 178:5 180:9,20 184:1 186:2 194:20 197:19 201:13 203:1 209:19 218:3 221:4 223:20 229:13 230:14 236:14 252:1 260:16 <b>ways</b> 107:10 126:9 201:11 <b>weather</b> 27:9 186:12 196:21 <b>website</b> 145:13	<b>Wednesday</b> 1:10 4:5 <b>week</b> 4:11 <b>weeks</b> 186:17 <b>weigh</b> 50:4 <b>welcome</b> 87:10 110:13 <b>went</b> 53:11 66:1 92:7 93:4 102:15 105:7 132:5 138:7 162:21 173:11 188:22 250:19 <b>weren't</b> 183:18 <b>west</b> 111:13 165:14 228:2 <b>we'll</b> 9:12 21:15 34:15 57:3 87:4 88:3 89:21 119:14 160:10,16 169:2,4 169:9 170:8,13,16 170:18,19 171:1 188:21 204:9 207:1 209:17 223:6 267:18 <b>we're</b> 4:3,5 24:19 52:7 53:18,18 59:3 60:6,10 82:11 87:20 88:6 96:15 98:22 99:1 118:9 119:5,11 123:8 124:1 144:6 147:21 149:6 155:9 165:11 166:15 169:3 171:16 174:1 175:12 177:8 181:1,8 185:10,11 185:11 186:19 188:18,19 191:5 191:18 193:20 194:3 202:20 207:7,9 209:5 213:1 214:14 215:15 217:6 220:1,3,12 222:9 223:11 250:9 257:6 259:13	260:11,18 <b>we've</b> 33:12,12 62:5 66:15 84:16 88:14 99:5 118:7 118:16 136:13 178:9 181:3 189:17 201:22 218:15 221:10 222:5 224:8 237:12 244:21 272:13 <b>whatnot</b> 210:12 <b>whipped</b> 135:4 <b>widespread</b> 183:10 <b>willing</b> 264:12 <b>Willmeng</b> 3:11 207:10,14,14,18 207:22 208:8 216:8 217:17 218:11 222:2,3,12 <b>win</b> 218:2,2,7,7 221:7 <b>wind</b> 134:22,22 135:4 <b>windfall</b> 40:1 <b>window</b> 71:21 <b>windstorm</b> 134:15 216:22 <b>Winter</b> 7:10,12 <b>Wisconsin</b> 1:8 5:6 14:14 117:13 227:19 <b>wish</b> 132:11 220:6 <b>wishes</b> 204:2 <b>withdraw</b> 137:12 <b>withstanding</b> 251:22 <b>witness</b> 3:2 11:1,4 11:15 18:15,18,21 19:2 20:4 22:1 24:9,13,21 25:5 25:15,19 47:6 83:13 85:11,15,18 86:1,4,8,13,21 87:1,9,21 88:2,7 89:15 90:1,16 91:5,10,12,22	92:22 93:6 95:10 96:2 97:3 116:6 121:5,9 139:5 140:11 141:17,20 142:9 144:2,12 147:14,18 150:15 156:15 157:11 163:15,19 164:8 165:5 167:1 179:19,21 180:14 188:4,8,12,21 189:2,4 191:15 192:3,6,9 194:4 195:15 202:18 203:7 206:8 208:1 220:11 222:5,11 222:18 223:14,22 226:13,15,17,20 227:5 249:4,11 250:1,9 253:10,18 253:21 256:13,18 256:21 257:4 271:19 274:14 <b>witnesses</b> 9:6,11,21 24:15 148:4 242:1 275:17 <b>wondering</b> 84:2 87:5 132:22 157:7 218:20 249:19 <b>word</b> 162:6 <b>words</b> 61:5 248:4 <b>work</b> 6:5,11 17:5 57:12 77:16 88:2 90:4,22 94:17 120:15 133:13 146:9 157:14,17 168:9 174:10 185:2 191:14 196:19 206:15 264:21 <b>worked</b> 16:16,17 16:20 37:15 98:8 230:5 <b>working</b> 55:18 91:7 98:15 181:8 201:22 202:1 221:20 260:1	<b>works</b> 33:1 48:4 52:15 151:21 226:7 248:12 276:14 <b>world</b> 177:9 <b>worse</b> 128:2 <b>worth</b> 210:10,14 216:20 234:3,5,6 236:15 237:11,20 237:21 238:21 239:9 245:1 246:6 <b>wouldn't</b> 81:4,5 90:9 114:22 131:5 139:18 141:5 143:22 178:9 189:12 190:20 <b>write</b> 160:20 249:9 <b>written</b> 31:7 36:5 156:1 225:19 226:11 <b>wrong</b> 115:19 124:22 140:20 <b>wrote</b> 272:6 <b>W-i-l</b> 207:16 <b>W-i-l-l-m-e-n-g</b> 207:15 <hr/> <b>X</b> <hr/> <b>X</b> 50:15 51:1 <hr/> <b>Y</b> <hr/> <b>yeah</b> 62:20 78:13 84:1 85:12,18 89:2 93:1 121:9 129:15,16 135:19 138:4 143:9 146:6 163:9 167:1 192:10 201:21 217:14 219:2 220:7,11,12 221:17,18 227:4 249:4 <b>year</b> 27:19 28:6 31:3,3 33:22 35:12 52:11,20 53:6,6 55:4 57:11 58:19 59:4,16 60:3 61:22 62:3
--	---	---	---	---

67:3 71:1 73:6,11	119:19 122:20	<b>06</b> 272:9	<b>11:15</b> 87:19 88:3	<b>180</b> 255:12 256:3,5
73:11 77:20 79:21	125:14 127:11,13	<b>07</b> 272:9	<b>11:29</b> 96:16	257:5 260:8
79:22 80:7,8	142:8 152:12	<b>08</b> 103:19	<b>110</b> 58:18 59:15,22	<b>187</b> 84:20
84:11,13 88:12	160:10 166:11	<b>09</b> 104:15 105:3,8	60:1,2 84:13	<b>19</b> 190:10
89:13,18 99:14,15	167:10 190:10	106:8,17 113:12	259:7,15	<b>19.7</b> 106:10
100:12,16,16	208:16 209:17	119:16 123:4	<b>111</b> 3:6	<b>190.4</b> 190:8
102:3,7,7,21	230:9 233:12	126:22 128:18	<b>113</b> 260:20 261:10	<b>1927</b> 102:11,15
103:3,11,13	239:22 241:20	138:6 190:7,13	262:3,8	<b>195</b> 3:10
104:17 105:6	242:14,16 245:2,5	214:22	<b>12</b> 3:14,21 164:12	<b>1960</b> 105:10
107:4,5,6,14	245:13 265:8	<b>09's</b> 106:14	164:13,16 192:3	<b>1970</b> 165:18
108:4 109:22	266:4 267:16		193:13,15 258:13	<b>1973</b> 165:19
113:12 119:15	268:13,19,20	<b>1</b>	<b>12,000</b> 130:16	<b>1976</b> 98:6
121:12 122:9,19	269:1,8 273:16	<b>1</b> 3:14 12:9,14,16	<b>13</b> 3:14,15,21 19:21	<b>198</b> 262:9
125:15 127:1,5	<b>year's</b> 107:3 128:15	<b>1,000</b> 131:14	20:14 224:3,9,9	<b>1987</b> 18:9
128:5,18,21,22	241:6	234:20 235:7	224:14,14	<b>1990</b> 202:2
129:8 133:2 134:7	<b>yep</b> 133:5,5	<b>1,100</b> 131:15	<b>13.2</b> 112:20	<b>1992</b> 99:13
139:2,3,22 140:18	<b>yield</b> 19:3 112:2,2,9	<b>1,660</b> 19:4	<b>130</b> 210:6	<b>1996</b> 228:6
160:12,13,14	129:17 130:16,17	<b>1.2</b> 35:13 37:3	<b>14</b> 3:15,16,22 206:5	<b>1997</b> 69:15 151:15
176:6,16 177:4,8	139:11	<b>1:30</b> 207:4	224:4,9,10,14,15	228:9 271:20
177:8,11,11	<b>yields</b> 69:21 112:10	<b>10</b> 3:19 92:2 97:14	225:5 262:22	<b>1998</b> 134:3
186:22 187:10	129:19	116:5,6 124:17	<b>14th</b> 10:11	
191:6,7 203:22	<b>York</b> 1:6 5:5 14:13	126:22 127:1	<b>140</b> 59:1 88:15	<b>2</b>
204:1 205:17,22	26:13 117:12	130:15,15 137:20	89:22	<b>2</b> 3:14 12:21 13:2,4
210:18 214:10,11	227:18	138:2,11 140:2,5	<b>148</b> 3:8	<b>2,250</b> 234:18
215:2,2 216:21	<b>young</b> 109:19	149:8,14,18 150:2	<b>149</b> 3:19	<b>2,500</b> 234:22 235:4
219:7,9,10,11,16	131:19 152:18	187:22 188:4,16	<b>15</b> 3:17,22 38:2	238:10
219:19 220:3,6,13	154:4 159:22	188:19 190:7	224:9,12 260:14	<b>2:30</b> 207:5
220:15 225:21	160:4	231:12 251:18	261:6	<b>2:37</b> 207:8
226:11,15 228:8,9	<b>younger</b> 215:8	<b>10,000</b> 234:11,12	<b>150</b> 3:19 33:8,12	<b>2:58</b> 223:12
228:11 232:15		235:1	<b>154</b> 59:3,7	<b>20</b> 1:10 4:4 31:4
233:17,22 235:19	<b>Z</b>	<b>10,100</b> 19:5	<b>160</b> 88:11,16,18	33:22 34:6 36:15
240:22 241:3,9,15	<b>zero</b> 90:7,8 167:18	<b>10:31</b> 82:8	89:20	38:22 39:1 55:20
241:16 243:11	<b>zone</b> 177:1	<b>10:41</b> 82:9	<b>163</b> 259:17	56:7 72:4 90:15
244:5 253:14		<b>10:50</b> 82:12	<b>164</b> 3:20,21	91:3,4 94:7,17
255:9,10 262:8	<b>\$</b>	<b>100</b> 103:3 132:11	<b>165</b> 3:9	142:8 166:14,16
272:21	<b>\$10,500</b> 272:5	142:14 176:21	<b>168</b> 262:13	166:21 167:2
<b>years</b> 28:15,18,19	<b>\$340</b> 130:11	199:3 208:16,16	<b>17</b> 56:1 66:16	176:1 189:10
29:17 30:6,8	<b>\$46,699</b> 272:4	210:4	259:10,14,16	196:4
39:14 40:8 41:20	<b>\$7</b> 181:21	<b>100,000</b> 35:5 36:4	261:7	<b>200</b> 36:13 88:19
46:6 51:22 52:1,6	<b>\$750,000</b> 76:10	<b>11</b> 3:3,20 19:14	<b>170</b> 79:19,20 80:1,7	106:13 127:2
54:16 59:3 61:13	146:22 182:1,14	148:21 149:2,20	84:12,22 85:1,8	<b>200,000</b> 55:11,12
62:15 99:6,9,10	212:9	151:3 163:21	86:6,9 250:22	<b>2001</b> 17:8 99:16
99:13,17 100:18		164:1,3,5 192:4,4	255:10,12 259:9	242:5 272:8
101:4 105:5,17	<b>0</b>	203:13 204:21	259:11,16	<b>2002</b> 102:8,13
108:7,8,8 109:1	<b>01</b> 105:2,5	257:11 271:13	<b>18</b> 32:9 42:22 43:6	103:1 272:8
110:17 112:19	<b>02</b> 103:19 104:9	272:11	56:1 72:4	<b>2004</b> 17:10
114:11 117:16,17	118:5,5	<b>11-0093</b> 1:6 5:7	<b>18,456,000</b> 19:16	<b>2006</b> 16:17,19
	<b>03</b> 103:19			

<b>2007</b> 98:7	178:7,7 189:10	<b>36</b> 112:8	<b>500</b> 75:13 238:12	<b>8:30</b> 1:17 4:2
<b>2008</b> 37:17	234:14,17 237:14	<b>364-8996</b> 1:22	238:15	<b>82</b> 270:22 272:4,7
<b>2009</b> 16:19,20	<b>250</b> 234:21 235:8	<b>37.75</b> 242:4	<b>54</b> 34:2 38:11 79:11	272:12
37:16,16 45:19	237:19 238:13	<b>38.6</b> 100:3	79:18 80:2	<b>83</b> 261:10 262:12
46:14,14 52:7	<b>26</b> 112:16	<b>38.8</b> 100:14	<b>55</b> 18:8 166:16,21	<b>85</b> 188:17 199:5,6
152:3 171:15	<b>265</b> 252:17 254:12	<b>39</b> 259:19	167:3 259:18	262:7,8,10
174:20 183:12	<b>270</b> 254:13,13	<b>395.6</b> 19:9	<b>57</b> 94:9,11,21	<b>86</b> 272:8
185:17 188:1	256:15 257:2,6		106:14,19	<b>87</b> 105:5 272:8
189:2,11 190:17	<b>275</b> 88:19 91:10	<b>4</b>	<b>57,214</b> 272:2	<b>88</b> 199:4,5
191:2,8 202:8	<b>280</b> 52:21	<b>4</b> 3:15 14:2,7,9	<b>576</b> 226:3,9	<b>88,000,000</b> 20:1
225:21 226:13,14	<b>284.4</b> 101:8	258:13	<b>58</b> 79:12 94:11,21	<b>88,082,000</b> 19:17
226:19 227:6	<b>289</b> 100:4	<b>4.26</b> 243:4		20:5
242:3	<b>29</b> 18:10	<b>4.3</b> 36:3	<b>6</b>	<b>89</b> 166:7
<b>2010</b> 3:21,22 53:21	<b>29.2</b> 104:12	<b>4.4</b> 35:17 37:11	<b>6</b> 3:17 15:2,6 19:12	
106:12 110:20	<b>295</b> 252:19	55:7 101:8	20:9,17,20,22	<b>9</b>
128:5 144:18	<b>3</b>	<b>4.6</b> 34:11	<b>6.49</b> 267:13	<b>9</b> 3:19 19:10 97:14
224:10,12 227:1,3	<b>3</b> 3:15 13:6,7,15,20	<b>4.7</b> 55:16	<b>60</b> 38:11 210:9	137:19,20 138:3
227:5 228:11	13:22 18:6	<b>4:00</b> 274:16	<b>60's</b> 111:8	140:4 149:7,10,12
271:21 272:9	<b>30</b> 71:22 80:7,10	<b>4:02</b> 276:16,18	<b>61</b> 242:7 256:8	149:15
<b>2011</b> 1:10 4:4 10:11	90:7,7,12,15	<b>40</b> 53:12 72:2 213:4	259:19	<b>9,000</b> 234:17
53:19 192:7	100:1 210:5 213:3	<b>42</b> 34:1 91:13 92:1	<b>62.5</b> 19:8	<b>9.4</b> 35:21 37:12
203:17 204:4	250:17 252:12,18	<b>4262</b> 165:14	<b>622</b> 243:4	38:15 55:15
206:5 276:20	253:4,8 254:4,7	<b>43</b> 226:18	<b>639</b> 110:22 111:5	<b>9:00</b> 275:10
<b>2012</b> 153:13 186:11	255:1 261:5,9	<b>45</b> 206:13 259:18	143:5 144:17	<b>9:04</b> 4:5
191:12,21 192:2,2	262:20	<b>47</b> 19:13 189:8	<b>64.2</b> 106:11	<b>91</b> 272:8
203:14,21 204:20	<b>300</b> 33:11,13 37:8	<b>48</b> 104:5	<b>662</b> 225:21	<b>92</b> 99:21 105:5
<b>2013</b> 206:5	60:16 89:8,10	<b>5</b>	<b>68</b> 37:18 38:12	199:3,4 272:8
<b>208</b> 3:11	250:10,14 253:8	<b>5</b> 3:16 14:11,19,21	45:20 46:8 55:21	<b>930</b> 10:10
<b>21</b> 3:18 190:10	253:10,10 257:7	19:2 254:13	256:9,12	<b>930.10</b> 229:21
276:20	265:9 267:3	<b>5,000</b> 238:11		233:18
<b>218</b> 262:13	<b>311</b> 100:20 103:22	<b>5,000,000</b> 29:4	<b>7</b>	<b>930.50</b> 230:3
<b>22</b> 272:5	<b>32</b> 37:19 46:1 53:12	<b>5.8</b> 34:10	<b>7</b> 3:17 15:14,17	232:19 233:19
<b>22nd</b> 3:21 224:10	112:13	<b>50</b> 18:8,15 32:11	19:6 20:9,11,13	<b>930.58</b> 231:3 232:6
<b>224</b> 3:21,22,22	<b>320</b> 53:4 60:15 80:9	33:5,9,10,11 37:9	21:3,18,19 188:19	<b>930.59</b> 145:19
<b>225</b> 33:10 267:3	105:20 123:11	43:10,14 52:22	<b>7CFR930</b> 227:20	<b>946-1510</b> 115:22
<b>231</b> 115:21	254:18	84:8 88:18,22	<b>7,500</b> 130:17 235:3	<b>95</b> 105:5 270:22
<b>236</b> 104:5	<b>332</b> 99:22	89:1,2,9,10 104:7	<b>70</b> 104:15	<b>96</b> 3:5 99:13,22
<b>24th</b> 3:22 224:11	<b>336</b> 242:6	105:17 107:1	<b>707</b> 1:22	272:4,8,12
<b>24.5</b> 101:2	<b>338</b> 242:4	125:18 176:17	<b>75</b> 124:13,18	<b>97</b> 99:16 112:14
<b>240</b> 104:1	<b>35</b> 110:17 213:4	210:9,10 237:14	176:21	272:8
<b>248</b> 262:9,18	260:15 261:7	238:8,15,20	<b>750</b> 235:10	<b>98</b> 105:5
<b>25</b> 3:4,18 29:16,17	<b>350</b> 35:16 79:9 80:1	250:21 253:6	<b>750,000</b> 202:20	
30:7,9 31:5 46:10	88:19 89:8 253:14	261:19 262:6	212:12	
48:17 49:11,12,13	254:18 255:12	<b>50's</b> 105:14	<b>8</b>	
49:16 68:21,22	<b>353</b> 105:8	<b>50,000</b> 18:15 28:14	<b>8</b> 3:18 25:8,10	
69:14,18 70:3	<b>358.9</b> 190:8	<b>50,050</b> 18:8,16,20	95:18,22 96:3	
112:18 124:14,19		<b>50.9</b> 102:4	<b>8:00</b> 276:12,17,20	

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Red Tart Cherries Grown in MI, NY,  
PA, OR, UT, WA and Wi

Before: US Department of Agriculture

Date: 04-20-11

Place: Grand Rapids, MI

was duly recorded and accurately transcribed under  
my direction; further, that said transcript is a  
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Court Reporter

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